

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

<i>Intercarrier Compensation for ISP-Bound Traffic</i>)	WC Docket 99-68
)	
<i>Developing a Unified Intercarrier Compensation Regime</i>)	CC Docket No. 01-92
)	
<i>ASAP Paging, Inc. Petition for Preemption of Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers</i>)	WC Docket 04-6
)	
)	
<i>IP Enabled Services</i>)	WC Docket No. 04-36
)	
<i>Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges</i>)	WC Docket 05-276
)	
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<i>Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-certification of IP-Originated VoIP Traffic</i>)	WC Docket 05-283
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<i>Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption</i>)	WC Docket No. 08-8
)	
)	
<i>Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. §160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)</i>)	WC Docket No. 07-256
)	
)	
<i>Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers.</i>)	WC Docket No. 08-152
)	
)	
<i>Petition for Waiver of Embarq Local Operating Companies of Sections 61.3 and 61.44-61.48 of the Commission's Rules and any Associated Rules Necessary to Permit it to Unify Switched Access Charges Between Interstate and Intrastate Jurisdictions</i>)	WC Docket No. 08-160

**FEATUREGROUP IP's
INTERCARRIER COMPENSATION "REFRESH" COMMENTS; WRITTEN EX
PARTE IN VARIOUS PROCEEDINGS; AND COMMENTS ON AT&T AND EMBARQ
PETITIONS FOR INTERIM DECLARATORY RULING AND/OR WAIVERS**

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EXECUTIVE SUMMARY

The ILECs have finally quit pretending that they are not trying to eliminate the ESP Exemption.¹ For several years they presented arguments for delivering the *coup de grace* while consistently denying that was their goal and demanding that we all ignore the obvious. AT&T and Embarq, for example, still utter some meaningless qualifications or assurances that it is not so, but it is plain from the specific actions they seek – especially to anyone who knows how networks, billing systems and the ILECs actually operate – that they are asking the FCC to institute a “modem tax” for both narrowband and broadband customers whenever an Internet-based communication touches the “PSTN.”² Regardless of whether you call it an exception, an exclusion, forbearance or waiver these folks insist that if they cannot begin to recover access charges for ESP traffic “It’s The End Of The World As We Know It.”³

¹ FeatureGroup IP will refer to the “ESP Exemption” even though that is a misnomer. ESPs were never subject to switched access or even the predecessor ENFIA tariffs. The “exemption” is from something that never applied to begin with.

² It is hard to figure out what the ILECs mean when they say “PSTN.” They imply that the “PSTN” is limited to the legacy ILEC wireline telephone network and excludes CLECs and CMRS networks. FeatureGroup IP believes that the PSTN is the same thing as the “Public Switched Network” as defined in 20.3: “Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.”

³ *But see, R.E.M. – It’s The End Of The World Lyrics*, <http://www.stlyrics.com/lyrics/blastfromthepast/itstheendoftheworld.htm>, © STLyrics.com 2002 – 2008. *See also*, [http://en.wikipedia.org/wiki/It's_the_End_of_the_World_as_We_Know_It_\(And_I_Feel_Fine\)](http://en.wikipedia.org/wiki/It's_the_End_of_the_World_as_We_Know_It_(And_I_Feel_Fine)) [“The debate community has long rumored that the song is a reference to policy debate. This flows from the rapid-fire delivery (similar to ‘spread’ speech in a policy round), the myriad ways the end of the world will occur (policy debates often devolve into competing claims that the opponent’s advocacy will cause the end of the world), and other staples of debate rounds (e.g., ‘A tournament, a tournament, a tournament of lies. Offer me solutions, offer me alternatives and I decline.’). This was to some extent confirmed in an interview for the BBC documentary ‘The Seven Ages of Rock’ released on their website where Mike Stipe says: ‘The End of the World as we Know It...these were songs that were really addressing incredible social concerns of the time.’”] Wikipedia® Text available under GNU Free Documentation License.

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But AT&T and Embarq are not alone. The ILEC cartel collectively constitutes a "coalition of the killing." They all have legacy⁴ networks and systems,⁵ and the whole bunch of them want this Commission to hobble new technology so they can maintain the old way by taxing the new and mandating backwards compatibility that functionally precludes efficient or economical enhanced features and functions.

They all smell blood and think they may actually pull it off. Or, they sense collective failure and this is the last stand. Regardless, their attempts must fail. The best example of why this is so relates to AT&T's request for a "declaration" that under the present rules access charges apply to some ill-defined set of "IP-PSTN" and "PSTN-IP" services and particularly those that somewhere in them have "voice" or are "VoIP." The Commission has already rendered a declaration of what the current rules are:

6. Existing inter-carrier compensation rules may be categorized as follows: access charge rules, which govern the payments that interexchange carriers ("IXCs") and CMRS carriers make to LECs to originate and terminate long-distance calls; and reciprocal compensation rules, which govern the compensation between telecommunications carriers for the transport and termination of local traffic. Such an organization is clearly an oversimplification, however, as both sets of rules are subject to various exceptions (e.g., long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption).⁶

⁴ "Legacy" –adjective 5. of or pertaining to old or outdated computer hardware, software, or data that, while still functional, does not work well with up-to-date systems. <http://dictionary.reference.com/browse/legacy>, Dictionary.com Unabridged (v 1.1), © 2008, Dictionary.com, LLC and Random House, Inc.

⁵ "Legacy system" –jargon. A computer system or application program which continues to be used because of the cost of replacing or redesigning it and often despite its poor competitiveness and compatibility with modern equivalents. The implication is that the system is large, monolithic and difficult to modify. If legacy software only runs on antiquated hardware the cost of maintaining this may eventually outweigh the cost of replacing both the software and hardware unless some form of emulation or backward compatibility allows the software to run on new hardware. [http://dictionary.reference.com/browse/legacy system](http://dictionary.reference.com/browse/legacy%20system). Dictionary.com. The Free On-line Dictionary of Computing. Denis Howe. © 2008, Dictionary.com, LLC, Random House, Inc. and Dennis Howe. Text available under GNU Free Documentation License.

⁶ NPRM, *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132, ¶ 6, 16 FCC Rcd 9610, 9613 (rel. Apr. 2001) (emphasis added).

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AT&T says it wants a "declaration" but what it is asking for must be considered only in the context of rulemaking,⁷ not adjudication, because the current rules have already been interpreted to not impose access charges on the traffic they say they are talking about. The bottom line is that the ILECs simply refuse to accept what the law requires. If they want to change the law they most certainly know how to climb the steps of the Capitol.

The ILECs' "interim solutions" do not solve or even really address the underlying problem. They all just continue the "vicious regression"⁸ that has characterized inter-carrier compensation since passage of the 1996 Act. The same basic arguments existed before and after 1984, with the advent of Specialized Common Carriers, Radio Common Carriers and other forms of "competition." This debate has been going on ever since multiple entities started vying with each other to provide communications service and in one way or another "used" other networks as part of doing so. It has manifested in other industries as well and particularly those subjected to some form of common carrier status. The only solution is to recognize that the classification, order and quantity of the tigers, elephants and turtles down below⁹ do not matter if all inter-provider traffic exchange charges are governed by an "additional cost" standard.

Inter-carrier compensation – *all of it* – must reflect only the "additional cost" of terminating a call. All subsidies must be moved over to universal service support, which has to be explicit, nondiscriminatory and competitively neutral. Anything less will make the FCC

⁷ FeatureGroup IP submits, however, that a rule change purporting to impose exchange access charges on ESPs would be unlawful and outside the Commission's authority since Congress codified the ESP Exemption in 1996.

⁸ "Vicious regress" is "an attempt to solve a problem which re-introduced the same problem in the proposed solution. If one continues along the same lines, the initial problem will recur infinitely and will never be solved." http://en.wikipedia.org/wiki/Infinite_regression. Wikipedia® Text available under GNU Free Documentation License.

⁹ See http://en.wikipedia.org/wiki/Turtles_all_the_way_down. Wikipedia® Text available under GNU Free Documentation License.

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complicit in unfairly favoring owners of incumbent networks over developers of new technologies and innovators. The rule of law must be applied or it is not a rule at all.

Enhanced/information service providers are not carriers and do not provide telephone toll, so they cannot be held subject to exchange access charges. When two LECs exchange traffic and when the originating LEC is not functioning as a provider of telephone toll then §§ 251(b)(5) and 251(d)(2) directly apply. If and to the extent traffic exchanged between two LECs is subject to exchange access then they are joint providers and one LEC cannot charge the other because they each look to the entity providing telephone toll service for payment. The ILECs cannot force CLECs to implement the MECAB "Single Bill Option." Long-standing Commission rules, industry practice and even the ILECs own tariffs require mutual voluntary agreement in a contract before the Single Bill Option can be used. The same rules apply to CMRS to the extent it is providing "telephone exchange" and/or "exchange access" service.

There are fundamental questions regarding how multiple LECs signal, route and rate the traffic they jointly handle as co-carriers and peers. Most of these rules already exist, and many of the issues were already resolved even before the 1996 amendments. But the ILECs never quit trying to retroactively change rules they do not like. The Commission must rebuff the latest efforts and this time it must enforce the existing rules.

The ILECs' unrelenting campaign to eliminate the ESP Exemption and turn co-carriers and peers into "access customers" must be rejected. Now. The Commission must finish its statutory task of unifying intercarrier compensation on a holistic basis, without "interim" steps, declaratory rulings or waivers. If it does so the all of the cases in the caption of this pleading can come to a close. If it does not do so, then it must grant FeatureGroup IP's petition in WC Docket 07-256.

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INTRODUCTION

Setting: The Starship Enterprise has entered a zone dominated by a massive single-celled entity. The entity consumes all the energy in the zone: more than one billion lives have already been lost, including an entire Vulcan-crewed starship. All activities seem to have an opposite effect: reverse thrust draws the Enterprise further into the zone, but forward thrust appears to work like reverse and slows progress:

Captain Kirk: (Narrating for self and audience, then addressing Mr. Spock) "*This ship is in trouble. We'd better start solving problems faster than we pick up new ones. We seem to be in the middle of a creeping paralysis.*" Mr. Spock, analysis of that last burst of noise before we started losing power."

Mr. Spock: "That sound was turbulence caused by the penetration of a boundary layer."

Captain Kirk: "What boundary layer?"

Mr. Spock: "Unknown."

Captain Kirk: "Boundary layer between what and what?"

Mr. Spock: "Between where we were and where we are."

Captain Kirk: "Are you trying to be funny, Mr. Spock?"

Mr. Spock: "It would never occur to me, Captain."

Captain Kirk: "Do you have any ideas, Spock?"

Mr. Spock: "No specifics, but we seem to have entered a zone of energy which is incompatible with our living and mechanical processes. As we draw closer to the source, it grows stronger and we grow weaker."¹⁰

The Enterprise and its crew ultimately survive what appeared to be certain death by detonating an anti-matter bomb inside the membrane of the entity, destroying the creature and dissipating the zone.

• • •

Most of the participants in this debate would likely agree that intercarrier compensation and USF much resemble the zone encountered in *The Immunity Syndrome*. The outer boundaries of the entire zone and the internal demarcations between "compensation" and "universal service

¹⁰ Star Trek The Original Series, Season 2, Episode 18: "The Immunity Syndrome." CBS Studios Inc. TM© 2007. Episode plot summary available at [http://en.wikipedia.org/wiki/The_Immunity_Syndrome_\(TOS_episode\)](http://en.wikipedia.org/wiki/The_Immunity_Syndrome_(TOS_episode)). Wikipedia® Text available under GNU Free Documentation License.

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support" are opaque, unclear and dynamic. One minute is "here" ("where we are") but the next minute is "there" ("where we were"). There is a general consensus that everything is backwards in this zone: normal rules of economics, reason and finance are turned on their head. The resources consumed in this area – and in particular the money expended by those who do battle within it – are weakening the entire industry and the lack of certainty is distorting and delaying salutary entry into the communications market by nontraditional players.

The ILECs have managed to subvert the statutory intent – which is clear from the legislative history – of the 1996 amendments. Congress wanted to encourage entities that were not providing telecommunications service, and in particular enhanced/information service providers, to enter the market.¹¹ Congress inserted provisions to prevent states from erecting barriers to entry by ESPs and others.¹² The Conference Committee Report expressly says that Congress wanted small entrepreneurial ESPs to compete with ILECs. That intent was codified in § 253(a). The 1996 amendments also include § 257, which requires rule changes to identify and eliminate market entry barriers for entrepreneurs and small business in the provision and ownership of both telecommunications and information services. Finally, the ILECs are functionally attempting to limit and in some cases prohibit users and new entrants from employing new and different technology to enjoy or support innovative services. This violates both the spirit and intent behind § 157, which predates the 1996 amendments.¹³

¹¹ Conference Committee Report 104-230, p. 126 (February 1, 1996, 104th Congress, 2nd Session).

¹² *AT&T Communs. v. BellSouth Telecomms. Inc.*, 238 F.3d 636 (5th Cir. 2001).

¹³ Communications Act §157. This provision was enacted in the Federal Communications Commission Authorization Act of 1983, Public Law 98-214. Senate Report No. 98-67 explained the objective:

[t]he development of new technologies and the efforts of competitors seeking to respond to consumer demands will bring more service to the public than will administrative regulations. ... [a] claim that the new or additional service will provide competition that will take revenue from another service, either existing or proposed, will not be a valid rebuttal. ... The regulatory process ... should not act as a barrier to those who wish to provide new and additional services.

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The Commission must take immediate action. Half measures or decisions that only feed the creature will just make it worse. Every active participant generally agrees that the current broken, dysfunctional and increasingly irrational regime must be dismantled and the entire system must be holistically and comprehensively changed to one where inter-carrier compensation charges are moved to the "additional cost" standard and all implicit subsidies are moved to a reformed universal service system. Some, however, propose a lengthy and biased phased in approach. These proposals claim to move toward the desired result but they are asymptotic in that they never actually reach a unitary cost-based price or accomplish a truly technology-neutral interconnection and traffic exchange regime.

Each of the several sides insists that if holistic, comprehensive reform is not taken now then their favorite individual problems must be immediately resolved in their favor. The ILECs want to maintain the *ISP Remand Order* regime for calls to dial-up Internet access providers (but limit it only to calls to dial-up Internet access providers that are "physically located" in the same local calling area as the ILEC end user) or they want to move such traffic to "bill and keep." Some ILECs want to use the access charge regime for as many traffic types as possible even though Part 69 access charges do not generally meet the "additional cost" criterion in § 252(d)(2). Most want to extend the access regime to some or all VoIP,¹⁴ and are trying to *sub silentio* change the rules on jointly provided access so they can bill access charges to interconnecting LECs rather than the "access customer" or VoIP provider using the Multiple

See Memorandum Opinion and Order, In the Matter of Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization, WC Docket No. 82-536, FCC 84-187, ¶ 24, 98 F.C.C.2d 792, 803 (1984). [FCC order preempting state regulation of FM subcarrier use for common carrier paging services.]

¹⁴ It is not clear what the ILECs mean by "VoIP." Sometimes it appears they are referring only to "Interconnected VoIP" as defined by 47 C.F.R. § 9.3 but on other occasions they seem to be addressing the much broader class of voice-enabled IP based applications, services and devices including a consumer sitting at a Personal Computer talking over headphones and microphone attached to a sound card and using the codec and telephony application programming interface residing in the PC.

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Exchange Carrier Access Billing ("MECAB") Single Bill Option but without both LECs mutually and voluntarily agreeing to use that option as part of a separate contract. The small ILECs want to reinstate the "local call" criterion in Rule 51.701(b)(1) that was eliminated in the *ISP Remand Order* and then repeal 51.701(b)(2) so that access rather than reciprocal compensation would apply to calls between LECs and CMRS providers that do not both originate and terminate within the ILEC's state-defined local calling area even if they are within the same MTA. The rural ILECs want to require all carriers to pay the cost of transport from the rural ILEC's local calling area to a distant point of interconnection, regardless of call direction. Most ILECs are asking the Commission to impose legacy signaling requirements on IP-based technology – even though compliance would sometimes not be technically possible, would conflict with accepted Internet standards and would still not provide meaningful or helpful information for much of the new technology traffic in issue. All this is demanded as a means to prop up the very system that we all know is broken and to maintain legacy walled gardens. The ILECs' "very important - do this now" list goes on and on, and would essentially resolve every contested issue entirely in their favor *vis-à-vis* competitive carriers, non-carrier providers, and even individual users. King Canute is vainly ordering the new technology waves to recede because they threaten to sully his royal robes.

The ILECs' demands are usually accompanied by diatribes against hated "arbitrageurs" that are claimed to be taking illicit advantage of the current intercarrier pricing regime. Any given PSTN minute costs the same amount to terminate (or originate) regardless of its regulatory classification but it can have any number of different possible charges based on its regulatory classification under the existing rules. What the ILECs – and even the current Commission – fail

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to comprehend is that "arbitrage"¹⁵ is neither harmful nor evil; it is a natural and expected response by savvy investors to a market that has price inefficiencies or distortions. While the epithetical connotation is negative when used by the incumbents, the fact is that arbitrage serves a valuable and beneficial market function: it exposes market pricing inefficiencies and then acts as a tool to correct them. Arbitrageurs'¹⁶ "exploit[ation of] price inefficiencies keep prices more accurate than they otherwise would be." The ILECs despise arbitrage because it makes clear that their prices are not cost-based, and are not even market-based (*e.g.*, the pricing regime and price levels could not be sustained in a truly competitive marketplace), but instead contribute or receive massive cross-subsidies. The ILECs like their dominance and they want maintain the current regime – all their protestations notwithstanding. But to do so they have to have a

¹⁵ In economics and finance, arbitrage is the practice of taking advantage of a price differential between two or more markets: striking a combination of matching deals that capitalize upon the imbalance, the profit being the difference between the market prices. When used by academics, an arbitrage is a transaction that involves no negative cash flow at any probabilistic or temporal state and a positive cash flow in at least one state; in simple terms, a risk-free profit. A person who engages in arbitrage is called an arbitrageur such as a bank or brokerage firm. The term is mainly applied to trading in financial instruments, such as bonds, stocks, derivatives, commodities and currencies.

If the market prices do not allow for profitable arbitrage, the prices are said to constitute an arbitrage equilibrium or arbitrage-free market. An arbitrage equilibrium is a precondition for a general economic equilibrium.

Arbitrage has the effect of causing prices in different markets to converge. As a result of arbitrage, the currency exchange rates, the price of commodities, and the price of securities in different markets tend to converge to the same prices, in all markets, in each category. The speed at which prices converge is a measure of market efficiency. Arbitrage tends to reduce price discrimination by encouraging people to buy an item where the price is low and resell it where the price is high, as long as the buyers are not prohibited from reselling and the transaction costs of buying, holding and reselling are small relative to the difference in prices in the different markets.

"Arbitrage" is a French word and denotes a decision by an arbitrator or arbitration tribunal. (In modern French, "*arbitre*" usually means referee or umpire). In the sense used here it is first defined in 1704 by Mathieu de la Porte in his treatise "*La science des négocians et teneurs de livres*" as a consideration of different exchange rates to recognize the most profitable places of issuance and settlement for a bill of exchange ("*L'arbitrage est une combinaison que l'on fait de plusieurs changes, pour connoître [connaître, in modern spelling] quelle place est plus avantageuse pour tirer et remettre*"). See "Arbitrage" in Trésor de la Langue Française.

<http://en.wikipedia.org/wiki/Arbitrage>, Wikipedia® Text available under GNU Free Documentation License.

¹⁶ See, <http://www.investopedia.com/terms/a/arbitrageur.asp> © 2008 Investopedia ULC.

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captured¹⁷ and friendly regulatory environment that protects and preserves them, largely by preventing competitors from actually being able to compete (which would drive prices to cost) and by outlawing arbitrage that would also drive prices to cost. Arbitrage is only "bad" if you are an entrenched monopolist trying to maintain market power, non-market pricing and anticompetitive cross-subsidies. Or if you are a regulator and want to keep some set of prices artificially high for some reason and therefore must stop the market from doing what it usually does when there are supranormal returns for a given good or service.

The Commission was not always so anti-competition and so protective of the incumbents. The FCC used to embrace arbitrage as a valuable tool in the goal of having real, robust competition or, failing that, price levels resembling what would obtain in a robustly competitive market. Indeed, the FCC frankly stated that given the inefficiencies, shortcomings and failures of the regulatory process itself arbitrage was a way to let the market system exercise self-discipline. For a very long time the Commission correctly recognized that "arbitrage" is normal and

¹⁷ The economic literature is full of references to the concept of "regulatory capture." See <http://www.economist.com/research/Economics/alphabetic.cfm?LETTER=R#REGULATORY%20CAPTURE>; <http://econlog.econlib.org/GQE/gqe217.html>; <http://rru.worldbank.org/Documents/PublicPolicyJournal/060dnes.pdf>. A Google search for that phrase returned 40,200 references. Wikipedia describes it this way:

Regulatory capture is a term used to refer to situations in which a government regulatory agency created to act in the public interest instead acts in favor of the commercial or special interests that dominate in the industry or sector it is charged with regulating.

http://en.wikipedia.org/wiki/Regulatory_capture. FeatureGroup IP it is not equating "capture" with "corruption." Capture can happen naturally and almost without being recognized as a result of the background and orientation of the regulator. Economist Susan Crawford addressed the problem in a relatively recent paper:

Unlike the usual tale of regulatory capture, the work of FCC staff on these rulemakings was not necessarily corrupt, and can be explained in part by the cultural background of staff (their traditional telephony or bellhead orientation)."

Crawford, Susan P., "*The Ambulance, the Squad Car, and the Internet*," Berkeley Technology Law Journal, Forthcoming Available at SSRN: <http://ssrn.com/abstract=885582>, pp. 3, 60-66.

This is especially so when the regulator is confronting a disruptive technology or service that is functionally substitutable with a regulated service, but does not fit within the class of services that are subject to regulation. In this case, the conflict arises because "VoIP" is substitutable with traditional local or toll service, but on account of its operational characteristics is not subject to direct common carrier regulation, since it does not fit within the definition of "telecommunication service." It can resemble and amble like a duck, but is not because it is "duck plus."

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beneficial economic activity. The FCC expressly and unabashedly used "arbitrage" as a salutary tool to combat discrimination, to move prices towards cost, to allow efficient competitive entry and to protect against the exercise of excessive market power.¹⁸ How far we have fallen from

¹⁸ See, e.g., Policy Statement, *In the Matter of Policy Statement on International Accounting Rate Reform*, FCC 96-37, ¶¶ 4, 21, 11 FCC Rcd 3146, 3149 (rel. Jan. 1996) Released; Adopted January 31, 1996; Memorandum Opinion, Order and Authorization, *In re Application of AMERICAN TELEPHONE AND TELEGRAPH COMPANY; For Authority under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States*, File No. W-P-C-4841, FCC 83-221, ¶ 30 and note 33, 94 F.C.C.2d 48, 62-63 (rel. May 1983) ("We believe the twelve-month notice requirement would discourage resale, sharing and arbitrage. Arbitrage, in the Commission's regulatory scheme, is seen not as a means of developing vested interests, but as a way of bringing rates into line with competitive pricing patterns. Once the forces of arbitrage and/or sharing make the maintenance of monopoly-type rates infeasible, we expect that the initiator of these rates will eliminate the discrimination and the opportunity for arbitrage. ..."); Memorandum Opinion and Order, *In the Matter of American Telephone And Telegraph Company; Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, CC Docket 80-765, FCC 82-179, ¶ 16 and note 16, 89 F.C.C.2d 889, 896-897 (rel. April 1982) (The notion that rate structure elements in the WATS tariff may be a means to achieve price discrimination is not a new one. Indeed, we have evidence that WATS provision in the past may have prevented economic activity, such as arbitrage, the effect of which is to reduce price discrimination between users of the like services, MTS and WATS. ...); Memorandum Opinion and Order and FNPRM, *In the Matter of American Telephone And Telegraph Company; Offer of Facilities to Other Common Carriers*, Docket No. 21499, FCC 83-39 ¶ 20, 92 F.C.C.2d 1216, 1227-1228 (rel. Feb. 1983); Memorandum Opinion and Order, *In the Matter of American Telephone and Telegraph Company, and the Associated Bell System Operating Companies*, Transmittal Nos. 13661 and 13662; Transmittal No. 632, et al., FCC 81-222, ¶ 15, 86 F.C.C.2d 689, 694-695 (rel. May 1981) ("Because of this serious regulatory dilemma, the Commission has been forced in recent years to seek more manageable means of fulfilling its statutory oversight function. The means we are now employing include structural measures such as the removal of resale restrictions which, by making it possible for customers to arbitrage on different rates, should help align these rates more closely with costs, ..."); Memorandum Opinion and Order, *In the Matter of American Telephone and Telegraph Company; Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, Transmittal No. 13555, CC Docket No. 80-765; FCC 80-777, ¶ 33, 84 F.C.C.2d 158, 171 (rel. Dec. 1980) ("The Commission has therefore had to rely heavily upon other kinds of regulatory devices to fulfill its statutory mandate. These have included structural devices such as resale and shared use proceedings looking towards the elimination of potential barriers to arbitrage contained in tariffs, proceedings seeking to eliminate other types of tariff restrictions that may pose barriers to arbitrage or otherwise disadvantage the public without good reason, and proceedings designed to make AT&T's tariffs more readily comprehensible as well as to make any price discrimination more visible."); Report and Order, *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, CC Docket No. 80-54; RM 3453, 80-607, ¶¶ 2, 17, 18, 83 F.C.C.2d 167, 168-169, 175-176 (rel. Dec. 1980) ("For many years, certain carriers, such as ... AT&T ... have limited resale and sharing of their services through restrictions in their tariffs on file with this Commission. In 1974, however, we began to question whether these restrictions have operated to segment markets and sustain price discriminations. In other words, we were concerned that resale and sharing restrictions prevented normal economic activities such as arbitrage, which could help insure that rates are cost-based. Our theory may be plainly stated: by purchasing discounted bulk public switched network services such as WATS, and reselling them to smaller users as substitutes for MTS, arbitrageurs would create pressure on the underlying carrier to set rates for the discounted service which fully recover the costs of providing that service. ... Indeed, AT&T itself concedes that resale and sharing of all interstate telecommunications services can have "salutary effects" ... and that resale and sharing can benefit the public by assuring through the arbitrage mechanism that the resold and shared services are offered at rates closely related to cost. ... Our decision to prescribe unlimited resale and shared use of public switched network services reflects in large part our determination to alleviate the adverse impact of price discrimination. Thus we expect resale activities to moderate certain types of discrimination in the pricing of telephone services in instances where the firm is not providing a product or service in appropriate

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realistic, economic theory and practice – while still (but inconsistently) exuberantly purporting to embrace “competition” and “markets.”¹⁹

FeatureGroup IP contends that the ILECs – not the alleged “arbitrageurs” – are the creature sucking all energy within the zone. The zone creatures will continue to dominate and they will ultimately drain the life out of all those who dare to cross the ILECs’ boundary layers (wherever and whatever they may be). Soon, only the incumbent “wireline,” “cable” and “wireless” providers will remain. The communications industry will have come full circle.

The politics of this situation are admittedly hard. The incumbents have heavily invested (and have obtained very high returns from this investment) in lobbying efforts within the various halls of power. It all looks like a zero-sum game, where pushing down in one spot only makes another spot come up much like a waterbed, so why not just let them have their way. But it is not zero sum. Getting it right will lead to immense public benefit through value creation and positive externalities. Bailing out the ILECs will only make it worse. We started this “competition”

relationship to its cost. The desired result would come about when arbitrageurs (entities purchasing a product in one market and reselling it in another market for a guaranteed profit) are free to search out and capitalize upon attempts by the telephone company to charge different prices for the same product. If the decision to use MTS is not based on those aspects of the service which appear to differentiate it from WATS (e.g., dedicated access lines, advanced billing, two termination requirement) then it can be expected that removal of resale and sharing restrictions will result in consumers purchasing WATS service at cheaper unit rates, using none or only a portion and selling or sharing the rest with other users at cheaper rates than MTS. If WATS prices are not cost-based, the increased demand for WATS lines will eventually force the telephone company to withdraw the offering or reprice it such that rates are based on costs.”)

¹⁹ Perhaps the Commission is about to re-embrace this principle. It clearly was applied – albeit without using the word “arbitrage” – in the newly-issued *Comcast* order:

16. ... Finally, we find that exercising jurisdiction over the complaint would promote the goal of achieving “reasonable charges.” For example, if cable companies such as Comcast are barred from inhibiting consumer access to high-definition on-line video content, then, as discussed above, consumers with cable modem service will have available a source of video programming (much of it free) that could rapidly become an alternative to cable television. The competition provided by this alternative should result in downward pressure on cable television prices, which have increased rapidly in recent years.

Memorandum Opinion and Order, *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management"*, FCC 08-183, ¶ 16, File No. EB-08-IH-1518, WC Docket No. 07-52 (rel. Aug. 20, 2008).

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experiment after the end of the Second World War for specific reasons, and they were good reasons. *Hush-A-Phone*, *Carterphone*, MCI/Execunet, the *Computer Inquiries*, Divestiture and the 1996 amendments each embodied basic principles that are now being serially jettisoned. It is time to quit backsliding.

The law is clear. Twelve years have passed since the 1996 amendments, and gradualism is no longer an acceptable or lawful option. Discretion only goes so far. You have no choice but to fully and finally implement the law. The Commission most certainly cannot go backwards like the ILECs are asking you to do when the discussion turns to "piecemeal" or "interim" steps – particularly when each of those interim steps individually violates the plain requirements of the Act.

Fortunately the 1996 amendments – once read and faithfully applied – provide plenty of guidance and they do not support doing what the ILECs want. Inter-carrier compensation – *all of it* – must reflect only the "additional cost" of terminating a call. All subsidies must be moved over to universal service support, which has to be explicit, nondiscriminatory and competitively neutral. Enhanced/information service providers are not carriers and do not provide telephone toll, so they cannot be held subject to exchange access charges. Congress codified the ESP Exemption and the concept of co-carriage. When two LECs exchange traffic and when the originating LEC is not functioning as a provider of telephone toll then §§ 251(b)(5) and 251(d)(2) directly apply. If and to the extent traffic exchanged between two LECs is subject to exchange access then they are joint providers and one LEC cannot charge the other because they each look to the entity providing telephone toll service for payment. The ILECs cannot force CLECs to implement the MECAB "Single Bill Option." Long-standing Commission rules, industry practice and even the ILECs own tariffs require mutual voluntary agreement in a

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contract before the Single Bill Option can be used. The same rules apply to CMRS to the extent it is providing "telephone exchange" and/or "exchange access" service.

There are fundamental questions regarding how multiple LECs signal, route and rate the traffic they jointly handle as co-carriers and peers. Most of these rules already exist, and many of the issues were already resolved even before the 1996 amendments. But the ILECs never quit trying to retroactively change rules they do not like. Doing the ILECs' bidding will lead to massive confusion, extraordinary network reconfiguration and even more never-ending litigation.

These comments will address several of the individual topics before the Commission that collectively contribute to or are symptoms of the overall problem. The overall approach, however is the same for each: CLECs and CMRS providers are also part of the PSTN; they are peers and co-carriers and ILECs cannot force them to be "access customers"²⁰; the Commission

²⁰ The Commission dealt with and strongly rebuffed this position many years ago, but seems to have forgotten history or its lessons and it – along with the states – have not required AT&T and its ILEC cartel partners to abide by clear interconnection precedent. Long before the 1996 amendments, and over the then and now reconstituted AT&T's strenuous objections, CMRS carriers were held to be entitled to reasonable and non-discriminatory interconnection with ILECs. In 1949 the FCC allowed "radio common carriers" ("RCCs" and now "CMRS") to use radio frequency to provide Interconnected common carrier services that competed with the telephone companies. In 1976 and again in 1980, RCC rights to interconnection were reaffirmed. See, *Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service Under Part 21 of the Commission's Rules (Domestic Public Land Mobile Radio Service)*, 63 FCC 2d 87, 88; 1977 WL 38679 (F.C.C.) (1977); *Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service under Part 22 of the Commission's Rules (Memorandum of Understanding)*, 80 FCC 2d 352, 1980 WL 121568 (F.C.C.) (1980). These decisions expressly recognized that CMRS providers are co-carriers, not customers; that they have a right to and need for "peer-to-peer" interconnection with what are now called ILECs. In 1983, the FCC refused to let RCCs be treated like end user or IXC "customers," but instead required co-carriage rights. Memorandum Opinion and Order, *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, FCC 84-36, 97 F.C.C.2d 834, 882 (rel. Feb. 1984) ("Access Charge Second Reconsideration Order") ["RCCs are not end users except to the extent that they use exchange facilities for administrative purposes. ... RCCs are not and should not be treated as interexchange carriers under Part 69."] In 1986, the FCC once again reaffirmed that CMRS carriers are not "customers," but are co-carriers, and ILECs could not impose anticompetitive terms that injected inefficiency and additional, unwarranted costs. *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, ¶ 12, FCC 86-85 LEXSEE 59 Rad. Reg. 2d (P&F) 1275 (rel. Mar. 5, 1986) ("FCC Policy Statement"). The policy statement clearly described what co-carriage and interconnection was all about when two co-carriers are involved in handling telephone exchange or exchange access service and neither is acting as an IXC:

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must resolve signaling, routing and rating for all calls, both originating and terminating; we must have cost-based pricing with no implicit subsidies; all subsidies must be explicit and support network connectivity rather than specific services, technologies or business models; there should be a preference for lower cost new technology unfettered by legacy control; the rules must recognize and constrain market power or abuse of bottlenecks that inhibit real competition for services; transactional and regulatory costs should be minimized wherever possible. And, of course, the focus must be on complying with the entire Act.

The order of presentation in these Comments is not an indication of priority but is instead intended merely to facilitate an orderly and logical flow. FeatureGroup IP has already made most of these points – in much fuller detail – through prior comments in several of these inter-related or overlapping proceedings, so this set will be more summary in nature.

ARGUMENT

A. The ESP Exemption applies to all ESP non "telephone toll" traffic "touching" the PSTN, regardless of direction and regardless of whether the traffic flows to or from the ESP or is not between the ESP and a non ESP subscriber. It is not limited to traffic originated by consumers and addressed to dial up ISPs.

Enhanced services were defined long before there was a public Internet. ESPs do far more than just receive calls from dial-up users as part of providing access to the Internet. They provide a wide set of services and many of them involve calls to PSTN end users other than the

2. The Commission's general interconnection policy for cellular systems ... is that telephone companies are required to provide (a) a form of interconnection to a non-wireline carrier no less favorable than that used by the wireline cellular carrier and (b) a form of interconnection that is reasonable for the particular cellular system, to be negotiated by the cellular carrier and the wireline telephone company. ... A non-wireline cellular carrier is specifically given the right to request interconnection that may not be the same as that used by the wireline cellular carrier, and may not be "locked into the specific interconnection arrangements requested by a wireline carrier." ... The cellular carrier is entitled to reasonable interconnection, the form of which depends upon the cellular system design and other factors A cellular system operator is a common carrier, rather than a customer or end user, and as such is entitled to interconnection arrangements that "minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer." Underlying these policies was the goal of interconnection arrangements most favorable to the end user. (Emphasis added, internal citations omitted)

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ESP's "subscriber."²¹ The FCC observed in the first decision that created what is now known as the "ESP Exemption" that ESP use of the PSTN resembles that of the "leaky PBXs" that existed then and continue to exist today, albeit using much different technology. Leaky PBXs originate calls that terminate on the PSTN.²² The FCC expressly recognized the bidirectional nature of ESP traffic when it observed that ESPs "may use incumbent LEC facilities to originate and terminate interstate calls."

The following passage from one of the *Access Charge Reform* orders completely belies any attempt to limit the ESP Exemption:

341. In the 1983 *Access Charge Reconsideration Order*, the Commission decided that, although information service providersⁿ⁴⁹⁸ (ISPs) may use incumbent LEC facilities to **originate and terminate** interstate calls, ISPs should not be required to pay interstate access charges.ⁿ⁴⁹⁹ In recent years, usage of interstate information services, and in particular the Internet and other interactive computer networks, has increased significantly. ...

n498 The term "enhanced services," which includes access to the Internet and other interactive computer networks, as well as telemessaging, alarm monitoring, and other services, appears to be quite similar to the term "information services" in the 1996 Act.... For purposes of this order, providers of enhanced services and providers of information services are referred to as ISPs.

n499 *MTS and WATS Market Structure*, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22 (*Access Charge Reconsideration Order*). See also *Amendments of Part 69 of the Commission's Rules Relating to*

²¹ See, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 96-263, 94-1, 91-213, FCC 96-488, 11 FCC Rcd 21354, 21478, ¶ 284, n. 378 (rel. Dec. 24, 1996); Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, FCC 88-151, 3 FCC Rcd 2631, 2632-2633. ¶13 (rel. April 27 1988); Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983).

²² See, Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983) [discussing "leaky PBX and ESP resemblance"]; Second Supplemental NOI and PRM, *In the Matter of MTS and WATS Market Structure*, FCC 80-198, CC Docket No. 78-72, ¶ 63, 77 F.C.C.2d 224; 1980 FCC LEXIS 181 (rel. Apr. 1980) [discussing "leaky PBX"].

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Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (ESP Exemption Order).²³

The notion expressed continually by ILECs that the ESP Exemption was only for "connections between ESPs and their subscribers" is also pure mythology. Who is the ESP subscriber (and which is the "ESP") when a user launches an Internet Search that leads to a link allowing the user to "click-to-call" and have a conversation? What if neither the search engine nor any other entity wants to impose any charge for that function? There is no paying customer, nor should there have to be. Does it matter if the search initially started from a "cell phone"? The exemption was made to allow for innovation. The ILEC cartel wants to "regulate" innovation and force it to assume their image and their business model. Hogwash.

The various ILECs now owned by AT&T – none of whom have ever been strident advocates for a broad interpretation and application of the ESP Exemption – have had various CEI plans for several services that involved calls going out of the affiliated ESP's platform and to PSTN customers that are not the "ESP's subscribers" but are instead persons with whom the ESP subscriber wants to communicate. Similarly, these plans (including but not limited to those for voicemail platforms) contemplate calls coming in to the platform from nonsubscribers for processing and storage of information that is then delivered to subscribers.

The best and most analogous example is found in the CEI plans for "Facsimile Store and Forward Service" that AT&T-affiliated ILECs have had in place since at least 1995.²⁴ Those

²³ First Report and Order, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72, FCC 97-158, ¶ 341 and notes 498 and 499, 12 FCC Rcd 15982 (rel. May 1997) (emphasis added)

²⁴ One by "Ameritech" that was filed in 1995 is available at <http://www.att.com/PublicAffairs/PublicPolicy/CEIplans/81849.pdf>. That CEI plan was amended in 1999 to provide more functionality, and likely expanded the number of calls to the platform by "nonsubscribers" and from the platform to "nonsubscribers." <http://www.att.com/gen/public-affairs?pid=2987>. Southwestern Bell Telephone's similar plan from 1995 can be viewed at <http://www.att.com/PublicAffairs/PublicPolicy/CEIplans/82007.pdf>.

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plans involve calls from nonsubscribers wanting to reach subscribers and calls from subscribers wanting to reach nonsubscribers. Each is expressly treated as an enhanced service, and each is said to be fully eligible for the ESP Exemption.

The ILECs' attempt to revise history and limit (or, more precisely, eliminate) the ESP Exemption is just plain wrong. ESPs have always both originated and terminated traffic, and their services have always involved calls both to and from nonsubscribers, because enhanced/information services are for the very purpose of handling traffic between an ESP's subscribers and those on other networks who wish to communicate with them.

If a communication is handled by an ESP as part of a service or offering that meets the definition of enhanced and/or information service, then the ESP is an end user and is purchasing telephone exchange service. The ESP Exemption is not at all limited to calls from PSTN users employing a modem to launch sessions to their "local" dial-up Internet access providers. The rules long pre-existed the commercial Internet and they have applied to any ESP use of the PSTN, in either direction.²⁵ ESPs are end users – not carriers – and they are not subject to access charges.

B. The *ISP Remand Order* legal premise that ESP traffic is not subject to § 251(b)(5) and is or can be selectively and exclusively governed by § 201 has no statutory support. The \$0.0007

²⁵ AT&T's request for Declaratory Ruling or Waiver on page 7 and elsewhere tries to cloud the issue by complaining about calls addressed to a telephone number assigned to an ESP behind a CLEC's network that originates on the PSTN, is dialed 1+ and is then routed by an IXC to the CLEC for delivery to the ESP. What they fail to acknowledge is that this is a traditional "telephone toll" call from an end user and both the originating and terminating LECs (including AT&T the ILEC) are entitled to access charges from the IXC under the current rules. The ESP Exemption has never operated to prohibit assessment of toll charges on a residential or business end user (or access on the end user's IXC) when the end user reaches the ESP platform by making a traditional telephone toll call. The issue has always been whether the ESP can subscribe to telephone exchange service in order to be able to receive calls or make calls, or whether the ESP will be forced into the access regime and treated like an IXC.

In the example AT&T uses it seems to want to not assess its own IXC operations but to instead deem the terminating CLEC and/or the ESP to be AT&T's "access customer." This makes absolutely no sense whatsoever. FeatureGroup IP notes, however, that it does not engage in the practice AT&T complains of. We have never sent a single switched access bill to any IXC or LEC. In any event under our proposal this call and every other kind of call would be "rated" under § 251(b)(5) and any inter-carrier charges would be governed by the § 252(d)(2) cost standard.

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price is, however, a reasonable approximation of the "additional cost" associated with the transport and termination of a call.

The Commission should abandon its attempts to carve ESP traffic (or a subset of that traffic) out of all other traffic exchanged between LECs. Special rules and prices are illegal and inappropriate. If it is "telecommunications" and it is not "telephone toll" (which *is* statutorily subject to exchange access until the Commission decrees otherwise) then §§ 251(b)(5) and 252(d)(2) squarely apply. The D.C. Circuit has already precluded reliance on § 251(g). The suggestion by AT&T and others that the savings clause in § 251(i) somehow affords discretion to "carve out" some "telecommunications" from § 251(b)(5) has even less logical and legal force than did the § 251(g) excuse. It is long past time to quit letting ILECs cut and paste § 251(b)(5) so that they never pay compensation of any kind, and always recover access.

Section 251(b)(5) at first blush appears to apply to all "telecommunications" but 252(d)(2)(i) makes clear that the topic is traffic other than "telephone toll" that originates on one LEC's network and then terminates on an interconnected LEC's network. It says that charges must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Section 252(d)(2)(ii) clarifies how to measure "costs": the price must be a "reasonable approximation of the additional costs of terminating such calls."

While FeatureGroup IP believes that the *ISP Remand* has no legal support for the differentiation between ESP traffic and other LEC-LEC traffic, we also believe that the \$0.0007 price does in fact represent a "reasonable approximation of the additional costs of terminating

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such calls." We have no quarrel with the price. It would adequately serve for all LEC-LEC traffic where the two LECs have not agreed to a "mutual waiver of cost recovery."²⁶

C. The 1996 amendments codified the ESP exemption by creating an explicit definition of "information service" as contrasted with "telecommunications service" and then providing that only "telephone toll" is subject to "exchange access."

Another myth propagated by the ILECs is that the Commission can eliminate the ESP Exemption by changing or waiving the rules – in particular 69.3 and 69.5. Not so. Congress codified a definition of "information service" that is somewhat similar to the Commission's prior and still existing definition of "enhanced service."²⁷ The 1996 amendments also included a definition of "telecommunications" that expressly says there must be no change in form or change in content for something to be telecommunications.²⁸ The "information service" definition recognizes that telecommunications are used as an input, and then clearly talks about

²⁶ FeatureGroup IP's business plan and corporate policy are to not seek recovery of or in any way rely on intercarrier compensation. We always propose a mutual waiver of cost recovery for all traffic. We have never sent a single reciprocal compensation or switched access bill to any carrier.

²⁷ "Information service" is defined in § 153(20) of the Act:

(20) INFORMATION SERVICE.--The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

"Enhanced service" is defined at 47 C.F.R. § 64.702(a):

(a) For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

It is fairly well accepted that for the most part the two definitions overlap even though the exact wording is not the same. The only practical difference is that something is an enhanced service only if it is "offered over common carrier transmission facilities used in interstate communications" whereas information services need only be provided "via telecommunications." Non-common carriers can supply the telecommunications component for an information service. In other words, all enhanced services are information services, but not all information services are enhanced services.

²⁸ "Telecommunications" is defined in § 153(43):

(43) TELECOMMUNICATIONS.--The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

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changes in form or content (among other things) that preclude the output from being "telecommunications." Since the enhanced/information service output is not "telecommunications, it obviously cannot be a "telecommunications service"²⁹ because it is not "the offering of telecommunications for a fee." The Commission has repeatedly recognized that "enhanced/information service" and "telecommunications service" are mutually exclusive. It is one or the other.³⁰

After providing these definitions, Congress then codified the ESP Exemption. It did so in other defined terms. The logic is clear when you follow the definitions. An LEC provides "telephone exchange service" and/or "exchange access service."³¹ The Commission long ago

²⁹ See § 153(46).

(46) TELECOMMUNICATIONS SERVICE.--The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

³⁰ See, e.g., Report and Order and Notice of Proposed Rulemaking, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; WC Docket No. 04-242; WC Docket No. 05-271, FCC 05-150, ¶ 12, n. 32, 20 FCC Rcd 14853, 14862 (rel. Sept. 2005) [citing and reaffirming precedent].

³¹ Local Exchange Carrier is defined in § 153(26):

(26) LOCAL EXCHANGE CARRIER.--The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

Exchange access service is defined at § 153(16):

(16) EXCHANGE ACCESS.--The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

Telephone exchange service is defined at § 153(47):

(47) TELEPHONE EXCHANGE SERVICE.--The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service

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recognized that these are the only two functions an LEC provides.³² Exchange access is “for the purpose of the origination or termination of telephone toll services.” That is the only purpose listed for exchange access. If something is not a “telephone toll service” then it cannot – as a matter of law – be deemed to be receiving “exchange access service” from the LEC. Telephone toll,³³ of course, is by definition a telecommunications service. So if a service is not a telecommunications service, it cannot be telephone toll and it cannot be held to be subject to “exchange access” charges.

The only LEC alternative to “exchange access” is “telephone exchange service” – which most certainly includes the basic intercommunicating connectivity and capability that is provided to end users. Congress has therefore provided as a matter of law that enhanced/information services do not obtain “exchange access” service and instead obtain “telephone exchange service” just like ordinary end users. They codified the ESP Exemption.

D. Voice-enabled IP-based applications, services and devices are not telecommunications service and are not subject to “exchange access” charges under Part 69.

The question then becomes whether voice-enabled IP-based applications, services and devices are “telecommunications service.” Only if they are can they then be “telephone toll” and subject to “exchange access.” The legal answer is fairly easy: if there is a change in content as part of the offering, or if the putative ESP changes the form, then the offering cannot be “telecommunications” and therefore cannot be an offering of telecommunications for a fee.

charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

³² *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000) [“If the Commission meant to place ISP-traffic within a third category, not ‘telephone exchange service’ and not ‘exchange access,’ that would conflict with its concession on appeal that ‘exchange access’ and ‘telephone exchange service’ occupy the field.”]

³³ Telephone toll service is defined in § 153(48):

(48) TELEPHONE TOLL SERVICE.--The term “telephone toll service” means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

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1. Change of form.

The Commission ruled in the *AT&T Declaratory Ruling*³⁴ that AT&T converted from "TDM" to IP and then back to "TDM" and there was no change of content or offer of enhanced functions. In order to not be "telecommunications" there must be a "net change" in form. This ruling is defensible, but it must be applied to the putative ESP and cannot be applied "end to end." The statutory definitions look to what it is each individual entity does and offers; when establishing the regulatory classification of a single entity the Act does not consider what other entities do.³⁵ And, if the putative ESP provides wholesale services to other entities and does not directly offer to ultimate consumers, the Act does not allow the ESP to be classified based on what the user or consumer receives. Under the Act the classification turns entirely on what it is the putative ESP does and offers. Hence, if the ESP converts from TDM to IP and passes on the communication to another entity in IP then as to that ESP there is a "net change of form." The answer is the same if the ESP converts from IP to TDM.

Some changes in form do not qualify, and properly so. If the change in form is done merely for the convenience of the network, to correct network issues, to preserve subscriber content or to make new technologies interwork with the old then the definitional exclusion does not apply.³⁶ For example, a carrier may choose to offer a service that translates IP signaling information into "TDM" (SS7) signaling so that some of the new technologies like voice-enabled

³⁴ Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket 02-361, FCC 04-96, 19 FCC Rcd. 7457 (2004) ("AT&T Declaratory Ruling")

³⁵ This is made manifest by the recognition that information services are provided "via telecommunications" and enhanced services are provided over "common carrier facilities." The provision of "telecommunications" or "telecommunications service" by one entity (here the underlying carrier) does not result in the classification of another separate entity (the enhanced/information service provider) as a provider of telecommunications service.

³⁶ See, e.g., Memorandum Opinion and Order, *In the Matter of Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company Petition for Declaratory Ruling That All IXC's be Subject to the Commission's Decision on the IDCMA Petition*, DA 95-2190, 10 FCC Rcd 13717 (rel. Oct. 1995) ("IDCMA Frame Relay").

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IP-based applications, services and devices will interwork with the older TDM/SS7 networks to allow calls to be set up and torn down and for information analogous to that usually found in the SS7 ISUP IAM to be populated for delivery. If the carrier performs only the translation and maintains the content – albeit in changed form – and does not offer any enhanced functions then that is a telecommunications service just as the Commission held in *IDCMA Frame Relay*. Indeed, that is precisely what every LEC does today when it translates end users' ISDN PRI Q.931 D channel information element information into the analogous SS7 ISUP parameters. Clearly that is part of a telecommunications service function.

But providers often convert voice-enabled IP-based applications, services and devices from "TDM" to IP for more than mere convenience, to preserve content or for interworking. As will be shown below, the conversion to IP enables mid-call processing capabilities that support novel features and services to PSTN users as well as IP-based end-points. That discussion fits better within the section below addressing whether an offering is "enhanced" and or "information" service. Suffice it to say at this point that when ESPs perform the conversion – if any – it is done in very large part so that there can then be an offer of enhanced functions. It is therefore the kind of change in form that renders an offering not telecommunications.

2. Voice-enabled IP-based applications, services and devices change content and offer enhanced functions.

a. Change in content.

The other requirement in the definition of "telecommunications" is that there be no "change in the ... content of the information as sent and received." Voice-enabled IP-based applications, service and devices clearly, obviously and indisputably change the content of the information "sent" by the user; the information "content" that is "received" is not the information "content" that was sent.

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Let us first make clear what is "the content of the information" that is "sent" by the user, and what is the "content of the information" that is "received." Telephone handsets have a speaker and a mouthpiece. The sounds that impact a legacy handset cause the mouthpiece to vibrate, thus generating the electrical impulses that are transmitted across a legacy network.³⁷ Those sounds are not just "words" or "voice." All other sounds – like a door squeaking or a vacuum cleaner running in the background – are transmitted, and that is "the content of the information" that is "sent." Indeed, even "silence" can be content. Silence can most certainly have substance, purport or meaning³⁸ in many contexts. Therefore, the information "content" "as sent" for purposes of §153(43) is not merely the "words"; it is the electrical representation of all the sounds impacting (or not impacting) the microphone, including background noise and other aural information as well as spoken words. The entire "substance, purport or meaning" – including all the background noise and even the silence – is what must be considered when applying the "change in content" test.

In a legacy PSTN-PSTN call there is no change in content. The "information" sent from one handset is the same "information" received by the other handset. Silence and background noise are faithfully transmitted across the network and reproduced at the other end, so long as they fit within the voice band.³⁹ IP-based offerings, on the other hand, often employ Voice

³⁷ See http://www.sciencetech.technomuses.ca/english/schoolzone/Info_Sound.cfm#handset "How does the telephone handset work?"

³⁸ There is not a statutory definition of "content" in the Act, although § 705(a) comes close. The Electronic Communications Privacy Act does define content in 18 U.S.C. § 2510(8).

³⁹ "In order to eliminate unwanted signals (noise) that can disturb conversations or cause errors in control signals, the circuits that carry the telephone signals are designed to pass only certain frequencies. The ranges of frequencies that are passed are said to be in the pass band. Zero to 4000 hertz is the pass band of a telephone system voice channel-a VF channel. (Sometimes this band is called a message channel.) Bandwidth is the difference between the upper limit and lower limit of the pass band. Therefore, the bandwidth of the VF channel is 4000 hertz. However, the transmission of speech does not require the entire VF channel. The voice pass band is restricted to 300 through 3300 hertz. Hence, any signal carried on the telephone circuit that is within the range of 300 to 3300 hertz is called an in-band signal. Any signal that is not within the 300 to 3300 hertz bands, but is within the VF channel, is called an out-of-band signal. All speech signals are in-band signals. Some signaling transmissions are in-band and

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Activity Detection,⁴⁰ and Comfort Noise Insertion.⁴¹ These have multiple uses. VAD is used to conserve bandwidth among other things but it also helps to bring out the "voice" by distinguishing or enhancing it in relation to other background noise and it reduces the jarring effect of "sound" that suddenly starts after a silent period. Comfort Noise prevents the conversing parties from wrongly thinking the call has been disconnected. It is typically injected by the egress media gateway. Users are often able to turn it off if they prefer. The content changes are desirable and avoidable—each can be "turned off" or "tuned" by the provider (and often the user as well) and the services/application will still work. These functionalities and attributes are therefore "intended to be a service rendered to a customer."⁴² If the difference was not "evident" or "perceptible" then options for turning these functions on and off or for tuning them would not be necessary.⁴³

Most voice-enabled IP-based applications, service and devices involve use of codecs within the platform, at a gateway or at the IP edge, such as in a PC. It may be that "telecom" regulators do not know what a "codec" is, which would explain their incredulity when one tries

some are out-of-band." *Gateway Protocols, Defining Analog Voice*, Document ID: 8628, © 1992-2008 Cisco Systems, Inc. (Feb. 12, 2007), available at http://www.cisco.com/en/US/tech/tk1077/technologies_tech_note09186a00800a70bf.shtml.

But something like a dog whistle, which typically operates within the range of 16,000 Hz to 22,000 Hz (*See* http://wiki.answers.com/Q/How_many_hertz_high_is_a_dog_whistle, Copyright © 2008 Answers Corporation) would therefore not be transmitted across the traditional analog network even though it would wobble the heck out of that diaphragm in the handset.

⁴⁰ For an explanation and analysis of VAD see M.Y. Appiah, M. Sasikath, R. Makrickaite, M. Gusaite, "Robust Voice Activity Detection and Noise Reduction Mechanism" (PDF), Institute of Electronics Systems, Aalborg University (2005), available at http://kom.aau.dk/~myap04/pjts/final_report_8th.pdf.

⁴¹ http://en.wikipedia.org/wiki/Comfort_noise. Wikipedia® Text available under GNU Free Documentation License.

⁴² *See* Supplemental Notice of Proposed Rulemaking, *In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase II, FCC 86-253, ¶¶21-23, n. 30-31, (rel. Jun. 1986).

⁴³ It would be wrong to believe that users do not perceive any enhancements. The users obviously know they are receiving language translation, speech-to-text, text-to-speech or that the system is reading an email or a web page to them.

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to explain that voice-enabled IP applications, services and devices are enhanced/information service because they change content. See, <http://en.wikipedia.org/wiki/Codec> and http://en.wikipedia.org/wiki/Audio_codec.⁴⁴ Read the description. Then try to conclude that a standard audio codec is not a computer program that "generates, acquires, stores, transforms, processes, retrieves, utilizes and makes available information" and/or "employs computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; and provide the subscriber additional, different, or restructured information" and even allows "subscriber interaction with stored information." Voice-enabled IP-based applications, services and devices clearly do change content.

ESPs provide IP-based processing and enhanced services to their customers, which can be other providers or ultimate consumers. These offerings can – depending on how they are configured – support communication sessions comprised of voice, video, text, or other data communication applications. The session can originate on any type of device and it can connect to and be completed via any type of device. In other words, these services enable "any-to-any" connectivity, meaning that they transmit communications between any possible mix of IP and/or PSTN endpoints and make processing and communications enhancement capabilities available to every possible configuration, including but not limited to communications where one or more legs of the communication are on the PSTN during all or part of the session. These offerings fall neatly into the "information service" category.⁴⁵

⁴⁴ Wikipedia® Text available under GNU Free Documentation License.

⁴⁵ See, e.g., Report and Order and Notice of Proposed Rulemaking, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling*

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ESPs convert from TDM to IP when the communication session does not enter the ESP's network in an IP format and they then process the IP packets across their network so that the enhanced features and functions can be accessed and used. After processing, they then route the communication toward the desired endpoint. The conversion from IP to TDM is a necessary prerequisite to being able to offer and provide enhanced features and functions. Each of these services intrinsically involve interaction with and changes to customer-supplied information

or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, CC Docket Nos. 02-33, 01-337, 95-20, 98-10 and WC Docket Nos. 04-242 and 05-271, FCC 05-150 ¶ 15, 20 FCC Rcd 14853, 14864 (rel. Sept. 2005) (notes omitted, emphasis added):

15. The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, "between or among points selected by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as "information services." The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service. Indeed, as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Naming Service (DNS) capability "which (among other things) matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server." The end user therefore receives more than transparent transmission whenever he or she accesses the Internet.

The Enforcement Bureau used the same analysis in the Memorandum Opinion and Order, *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-014, DA 07-486, 22 FCC Rcd 3392 (rel. Feb. 2007)(Emphasis added):

25. NPTC is correct that the Commission has classified as "information service" an integrated service that combines transmission with the data storage, manipulation, processing, and retrieval portion, *i.e.*, the Internet service provider ("ISP") portion of an Internet access service. The ISP portion of an Internet access service typically provides end users with a comprehensive capability for manipulating information using the Internet, including applications such as web browsing, file transfers, e-mail access, Usenet newsgroups, and Domain Name System access. The Commission has also recognized that the "telecommunications" component of an Internet access service can be "part and parcel" of an integrated Internet access service offering, or it can be offered separately from the ISP portion of the service and consist solely of a transparent transmission path, with no changes to the form or content of the transmitted information. Carriers can choose to offer this transmission component as a telecommunications service on a stand-alone, wholesale, common carrier basis to ISPs, who then use that service as an input for the wireline broadband Internet access that the ISPs, in turn, offer to their own end user customers. Given the foregoing, the Commission has held that whether a service is a "telecommunications service" or an "information service" turns on the nature of the functions the purchaser is offered. The determinative question, briefly put, is: does the service offering involve only a transparent transmission path, with no changes to the form or content of the transmitted information; or does it involve data storage, manipulation, processing, and retrieval?

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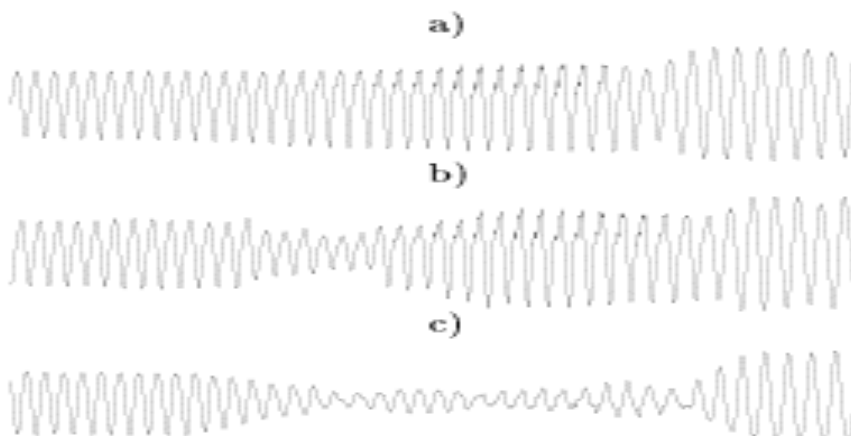
("content") with every session or "call." Because they offer "Any-to-Any" capability, a communication session may enter and leave the ESP's network in any number of different signaling protocols and codecs. Since IP networks generally use best-effort datagram-based network protocols to transmit media, a small but still significant fraction of the media packets are often lost in transmission. Engineering and information-theoretic techniques attempt to correct this issue. But by doing so, the system is providing the subscriber "additional, different or restructured information." This necessarily results in a change to the content "as sent and received" as explained below:

- a) PCM (Pulse Code Modulation) takes a digital signal such as voice or modulated modem tones and creates a digital recreation.
- b) T.38, an ITU standard, represents facsimile/modem modulated tones as data, which are recreated on the other side as modulated tones. Missing or lost data is retransmitted where possible or the gaps are interpreted where not.
- c) PLC (Packet Loss Concealment) is a method for dealing with packet loss in IP networks, whereby missing content is "concealed" through analysis of preceding parts of the bitstream and replacement of the missing packets with alternative content.
- d) CELP (Code-Excited Linear Prediction) is a hybrid of source and waveform coding, achieving the data rate of source coding and speech quality of waveform coding.
- e) LPC (Linear Predictive Coding) analyzes the speech signal by estimating the formants, removing their effects from the speech signal, and estimating the intensity and frequency of the remaining buzz. LPC provides human-recognizable quality improvements, and it actually interprets and predicts human speech and creates lost or missing data. This can be seen in the testing results reproduced below⁴⁶ comparing resulting waveforms from both CELP- and LPC-based encoders, in which the waveform in (b) is quite clearly providing the listener with different and restructured information, because it is predicting and supplying substituted data for that supplied by the user, based on other user supplied information.

⁴⁶ Fig.2 from ILCB – A Linear Predictive Coder With Robustness to Packet Losses
http://www.ilbcfreeware.org/documentation/iLBCpaper_andersen.pdf.

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Figure: Robustness of the Frame-Independent Long-Term Prediction compared to a standard CELP method. ITU-T Standard G.729A: a) original signal segment; b) decoded signal resulting from iLBC after a single IP Packet was lost in the transmission; c) same as b) but for G.729A.



Look closely at the picture above. “a)” is the original content “as sent” while “b)” and “c)” represent the content “as received” after processing by “VoIP” various platforms. They are not the same. There is an undeniable change of content.

b. Offer enhanced features and functions.

ESPs also offer other enhancements that are available at the user’s election or triggered by predetermined events. They are able to do so without regard to the type of equipment or edge device the user happens to be employing. For example, a user may initiate a communication session to another user and then invoke different network resources, such as retrieving a real-time stock quote from the Internet. The user can do this by sending a SIP INFO request from a soft client, IP phone, or a key combination from a mobile or POTS phone (which the ESP can perceive and then interpret and translate into a SIP INFO request). The ESP’s computing platform then decides the appropriate application(s) to which the user is directed. The use of IP in this environment is not incidental; it is essential to making enhanced features available to users – including those users who connect to the ESP’s network from legacy equipment. Many of these functions can be accessed and used simultaneously or sequentially, but they are all part of a complete integrated package of capabilities that are part of the ESP’s finished service.

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Voice-enabled IP-based applications, services and devices, for example, can support access to real-time information via both the 12 button POTS interface and voice recognition. Users on IP networks and even POTS customers can obtain stock quotes and driving directions and even the ability to communicate with instant messaging services such as Skype and GoogleTalk. Some providers offer the ability to send a command to "record" the conversation in digital format and deliver the recording to the requesting party by email or make it available by other means. Even what looks like a "PSTN-PSTN" session can use these resources – as well as bring in (conference with) an IP-based user, including users of voice-enabled instant messaging applications. PSTN users access this information by "dialing" a key combination at any point during a "call" invoking the other user or "leg" to be placed in conference or on hold. When the user is done accessing this feature, the call is rejoined or the original two-person communication is reinstated after the conference is dropped.

As can be seen from the foregoing, these enhanced functions are all part of an integrated offering, and they are usually engaged and used simultaneously with the underlying telecommunications input the ESP obtains from its supplying carrier vendor.⁴⁷ Yet an ILEC

⁴⁷ Many ESPs do not themselves supply the "telecommunications" input, but obtain it from an underlying carrier or provider and then "add" the enhanced/information functions to create the service that forms the offered "output." When this is the case, the ultimate product is not "telecommunications service" and the provider is an unregulated ESP. *IDCMA Frame Relay*, 10 FCC Rcd. at 13720 (1995); *NTCA v. Brand X*, 545 U.S. 967, 993 (2005) (*Computer Inquiry* precedent does "not subject to common-carrier regulation those service providers that offer[] enhanced services over telecommunications facilities, but that d[o] not themselves own the underlying facilities – so called 'non-facilities-based' providers."); See also, Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) ("*Computer Inquiry II*"). Many ESPs today resemble the Value-Added Network Service providers (VANs) that "are not facilities-based carriers, but rather purchase transmission facilities (i.e. the transmission lines linking switches together) from facilities-owning carriers." See, *IDCMA Frame Relay* 10 FCC Rcd at 13718, ¶ 5, n. 6. The VAN would purchase common carrier transmission facilities and then "add" enhanced functions. VANs were one of the primary beneficiaries of the ESP Exemption, and were specifically mentioned as such in the NPRM that proposed to eliminate the ESP Exemption. See, NPRM, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, FCC 87-208, ¶ 1, n. 3, 2 FCC Rcd 4305 (rel. July 17, 1987) ["We concluded in our Computer III proceeding that protocol processing would continue to be treated as an enhanced service. *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, CC Docket No. 85-229, FCC 87-102 (released May 22, 1987) (hereinafter *Phase II Order*). That decision had the effect of continuing to

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looking at the PSTN end-points would be unable to determine that the feature was available and/or ever used. Nonetheless, this is clearly the offer of enhanced features and services, and it is therefore not a telecommunications service but is instead an enhanced/information service as a matter of law.

E. Voice-enabled IP-based applications, services and devices are Enhanced/Information services.

If voice-enabled IP-based applications, devices and services fall within the definitions of either "enhanced service" or "information service" and they are not "adjunct-to-basic" then they cannot be telecommunications service since the categories are mutually exclusive. The Commission long ago defined what are known as "enhanced services." The definition has not been changed in many years, and it still appears at 47 C.F.R. § 64.702(a):

Sec. 64.702 Furnishing of enhanced services and customer-premises equipment.

(a) For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which ***employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.*** Enhanced services are not regulated under title II of the Act. (emphasis added)

Voice-enabled IP-based applications, devices and services do all of the above. The services ESPs offer, support or provide "computer processing applications." These applications "act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information." They "provide the subscriber additional, different, or restructured information." And they "involve subscriber interaction with stored information." The offer is integrated, and

exempt from access charges a major class of service providers -- the VANs (value added network providers), which offer protocol processing combined with packet-switched data services. See *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Supplemental Notice of Proposed Rule Making*, CC Docket No. 85-229, FCC 86-253 (released June 16, 1986), para. 46, n. 56." Even though VANs procured and to some extent resold the underlying basic service, their ultimate finished product was not subject to regulation because of the "contamination theory" -- which expressly applies only to "nonfacilities-based service providers. *Id.* ¶¶ 42-46.

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goes over telecommunications service (*e.g.*, "common carrier") facilities obtained from a carrier and then used in interstate commerce. The ESP quite often does not itself provide the telecommunications or common carrier input, but only adds the enhancement capability. The finished output is an enhanced service. Today's ESPs are very much like the VANs that preceded them.

They are also "Information Service Providers" because they provide "information service" as defined in the Act:

(20) INFORMATION SERVICE.--The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁴⁸

The offer is to provide "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." The offer is integrated, and usually goes over telecommunications obtained from a third party because the information service provider quite often does not itself provide the telecommunications input, and does nothing other than add the enhancement capability. This functionality and capability is not used to manage, control or operate a telecommunications system or manage a telecommunications service. Many ESPs have no telecommunications system to manage and they do not offer "telecommunications service" so there is nothing to "manage" there either. The finished output is an information service and these are information service providers.

As we already demonstrated above, an entity that is acting as an enhanced/information service provider is not providing "telecommunications" as a stand-alone or segregable product. The ESP is not providing any telecommunications service. The service therefore cannot be

⁴⁸ 47 U.S.C. § 153(20).

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"telephone toll" – which is by definition a telecommunications service. The ESP is accordingly not subject to exchange access charges under the Act or Part 69.⁴⁹ The telecommunications service product the ESP procures from an LEC to receive traffic originated by its users or the public, or to address traffic that is terminated to an end user on the PSTN is and can only be "telephone exchange service." Access charges do not apply to the ESP or to any LEC that collaborates to complete the call at either end.

F. Even if exchange access does apply under the rules or could apply under the statute an LEC that provides PSTN connectivity that supports a voice-enabled IP-based application, service or device offered or supplied by a third party is not the terminating LEC's "access customer." The third party ESP is the access customer and the two LECs are joint access providers under industry practice, FCC rules and all LEC tariffs.

The most irksome aspect of the ILECs' jihad is that they appear to want to collect access charges from both the ESP and the CLEC that is providing PSTN connectivity to the ESP. Even if – contrary to all the argument above – one or more of the LECs involved in call origination or termination is somehow entitled to recover exchange access charges, there can be no doubt that the charges can only be collected from the ESP and not from any of the other collaborating LECs. The Commission's rules and rulings on LEC joint access provision and the ILECs' own tariffs directly prevent any such result.

AT&T, Embarq and the rest of the ILEC cartel cannot force FeatureGroup IP to adopt the Single Bill Method for Joint Access billing but that is exactly what they propose to do in their various requests for "forbearance," "Declaratory Ruling" "Interim Relief" or "Waiver." Note 92

⁴⁹ 47 C.F.R. § 69.5(b) provides that "Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." An ESP is not either a common carrier or a private carrier. Therefore it cannot be an "interexchange carrier." Further ESPs do not use local exchange switching facilities "for the provision of telecommunications service." They simply are not subject to assessment of "carrier's carrier charges" under this rule. Similarly, the CLEC that provides PSTN connectivity to the ESP is providing either telephone exchange or exchange access service, which are LEC functions. The CLEC is not acting as an "interexchange carrier." Therefore the CLEC cannot be assessed either.

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of the *AT&T Declaratory Ruling* recognized that with regard to "access" traffic all the LECs involved are engaged in providing exchange access service and one LEC is not the customer of the other LEC.⁵⁰ The *Local Competition Order*⁵¹ also correctly noted that when two LECs are interconnecting under § 251(c)(2) they are co-carriers and meet-point is the appropriate regime for handling jointly-provided access.⁵² The concept of co-carriage between incumbents and insurgents was put in place long before the 1996 amendments when the Commission was creating mobile services,⁵³ and they incorporated the idea. Anyone who remembers how CMRS

⁵⁰ *AT&T Declaratory Ruling*, 19 FCC Rcd at 7471, note 92 ["We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise."]

⁵¹ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 (rel. Sept. 1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *further aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 525 U.S. 366 (1999).

⁵² 553. ... In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point. We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement. (Emphasis added)

⁵³ CMRS carriers were held to be entitled to reasonable and non-discriminatory interconnection with ILECs. In 1949 the FCC allowed "radio common carriers" ("RCCs" and now "CMRS") to use radio frequency to provide interconnected common carrier services that competed with the telephone companies. In 1976 and again in 1980, RCC rights to interconnection were reaffirmed. See, *Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service Under Part 21 of the Commission's Rules (Domestic Public Land Mobile Radio Service)*, 63 FCC 2d 87, 88; 1977 WL 38679 (F.C.C.) (1977); *Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service under Part 22 of the Commission's Rules (Memorandum of Understanding)*, 80 FCC 2d 352, 1980 WL 121568 (F.C.C.) (1980). These decisions expressly recognized that CMRS providers are co-carriers, not customers; that they have a right to and need for "peer-to-peer" interconnection with what are now called ILECs. In 1983, the FCC refused to let RCCs be treated like end user or IXC "customers," but instead required co-carriage rights. Memorandum Opinion and Order, *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, FCC 84-36, 97 F.C.C.2d 834, 882 (rel. Feb. 1984) ("*Access Charge Second Reconsideration Order*") ["RCCs are not end users except to the extent that they use exchange facilities for administrative purposes. ... RCCs are not and should not be treated as interexchange carriers under Part 69."] In 1986, the FCC once again reaffirmed that CMRS carriers are not "customers," but are co-carriers, and ILECs could not impose anticompetitive terms that injected inefficiency and additional, unwarranted costs. *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, ¶ 12, FCC 86-85 LEXSEE 59 Rad. Reg. 2d (P&F) 1275 (rel. Mar. 5, 1986) ("*FCC Policy Statement*"). The policy statement clearly

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interconnection developed will immediately recognize that Congress borrowed heavily from the FCC's CMRS interconnection experience and rules, including the obligation to negotiate contracts in good faith.

If and to the extent IP-enabled services, applications and devices are deemed subject to access then all the involved LECs are engaged in providing access service to the third party "access customer." One LEC does not owe access to the other and they each individually look to the access customer – unless the LECs voluntarily and mutually agree to the MECAB "Single Bill Option" in a separate contract.

More than 20 years ago the Commission required the industry to move away from "single bill/single tariff" or "LEC-LEC" billing for jointly provided access. The FCC required all LECs to instead use "meet-point" access billing.⁵⁴ While the road was bumpy at times, meet-point arrangements are now the foundation, and MECAB governs these arrangements. The Commission requires LECs to follow MECAB.⁵⁵ Thus – just like all other LECs, including

described what co-carriage and interconnection was all about when two co-carriers are involved in handling telephone exchange or exchange access service and neither is acting as an IXC:

2. The Commission's general interconnection policy for cellular systems ... is that telephone companies are required to provide (a) a form of interconnection to a non-wireline carrier no less favorable than that used by the wireline cellular carrier and (b) a form of interconnection that is reasonable for the particular cellular system, to be negotiated by the cellular carrier and the wireline telephone company. ... A non-wireline cellular carrier is specifically given the right to request interconnection that may not be the same as that used by the wireline cellular carrier, and may not be "locked into the specific interconnection arrangements requested by a wireline carrier." ... The cellular carrier is entitled to reasonable interconnection, the form of which depends upon the cellular system design and other factors A cellular system operator is a common carrier, rather than a customer or end user, and as such is entitled to interconnection arrangements that "minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer." Underlying these policies was the goal of interconnection arrangements most favorable to the end user. ((Emphasis added, internal citations omitted)

⁵⁴ Memorandum Opinion and Order, *In the Matter of Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145 Phase I, FCC 84-51, 97 F.C.C.2d 1082, 1283 (rel. Feb. 1984).

⁵⁵ See, e.g., Memorandum Opinion and Order, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 87-579, DA 87-1858 ¶¶ 29-31, 3 FCC Rcd 13 (rel. Dec. 1987) ("Joint Access Billing Waiver Order"). See especially, ¶ 30 [" 30. Because these standards are essential to the successful and fair implementation of meet point billing, and because we believe that carriers' adherence to these standards will increase customer certainty and administrative efficiency, we have determined that a waiver of

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CLECs – AT&T's LEC interstate access tariffs and Embarq's interstate access tariff expressly adopt and implement MECAB.

For most of the last two decades the "Single Bill Method" has required that both LECs voluntarily and mutually agree through a separately negotiated contract before the "single bill option" is used. The Commission originally outlawed the previous iteration of the "single company arrangement" but allowed use of the Single Bill Method to implement meet-point billing if the two LECs voluntarily agreed to use that method in a separately negotiated and voluntary contract. This could not be any clearer from the discussion in ¶ 34 and note 25 in the *Joint Access Billing Waiver Order*.⁵⁶

Section 61.74(a) of the Commission's Rules, 47 C.F.R. § 61.74(a), for the express purpose of allowing each tariff to reference among its technical publications both the MECOD and the MECAB standards, is appropriate and necessary. This Order will accordingly grant such a waiver, and require each carrier to modify its meet point billing tariff revisions to accept and adhere to these standards, placing them in the section at the beginning of the tariff covering technical references."]

⁵⁶ 34. The guidelines further specify that for all single bill options, the tariff should define single billing as it is defined in the MECAB: a single bill consists of all rate elements applicable to access services billed on one statement of charges under one billing account.^[n25 set out below] For the single bill/multiple tariff option, the tariff should state that interpretation and application of tariffs for non-billing companies must be communicated to the billing company. For the single bill/pass-through option, the tariff should state that each non-billing LEC is responsible for preparing its own bill for its portion of access service, and for forwarding the bill to the billing carrier. The case of the single bill/single tariff option presents questions of cost support and timing that will require further consideration.

ⁿ²⁵ While the single bill/single tariff resembles the single company arrangement rejected by the Commission in its March 28 Order, the significant distinction is that in the former, the relationship between the billing carrier and the other joint LEC provider(s) is a tariff relationship, **while in the latter, the relationship is strictly contractual.**

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Embarq's⁵⁷ and AT&T Texas's⁵⁸ access tariffs – just like those for every other ILEC

⁵⁷ See Embarq Interstate Access Tariff, FCC No. 1 § 2.8 (emphasis added):

2.4.8 Ordering, Rating and Billing of Access Services Where More Than One Exchange Telephone Company or Rate Schedule is Involved

When ordering, rating and billing of Access Services under this tariff involves more than one Exchange Telephone Company or rate schedule, *the Telephone Companies involved will mutually agree upon one of the billing methods* as set forth in (A) or (B) following based upon the interconnection arrangements between the Telephone Companies and the availability of measurement capability.

...

The Exchange Telephone Companies involved in providing the Access Service will develop a *mutually agreeable* working arrangement to allow one of the Exchange Telephone Companies to perform "Access Service Coordination" (ASC) for all services requested.

(B) Multiple Company (Interconnection Point) Billing.

When an Access Service ordered by a customer involves more than one Exchange Telephone Company or rate schedule, *the Exchange Telephone Companies involved will agree* upon one of the following billing methods:

Single Bill Method: The *Exchange Telephone Companies involved will mutually agree* upon a "billing company" which will render the bill for the Access Service provided. The designated billing company will perform the "Access Service Coordination" (ASC) function for the service requested, determine the applicable charges, and bill the customer for the entire service in accordance with its Access Service tariff. The designated billing company will be billed by the other Exchange Telephone Companies involved for the portion of the Access Service they provide.

...

⁵⁸ See Southwestern Bell Telephone Company, FCC 73 § 2.6 (emphasis added):

2.6 Jointly Provided Access Services

Jointly Provided Access Service has one end of the service in one exchange telephone company operating territory and the other end of the service in another exchange telephone company operating territory. When Access Service, other than MicroLink II, is jointly provided, the *exchange telephone companies involved will agree upon a billing, design and ordering arrangement which is consistent with the provisions contained in this section and the Ordering and Billing Forum Standards, Multiple Exchange Carrier Access Billing (MECAB) and Multiple Exchange Carrier Design and Ordering (MECOD)*. Customers who want to receive these documents may obtain ordering information from the Reference to Technical Publications section of this tariff. Prior to implementation of, or changes to these billing arrangements, the exchange telephone companies involved will give the affected customers 30 days notice.

...

2.6.2 Single Bill-Single Tariff Meet Point Billing Arrangement

The Single Bill-Single Tariff Meet Point Billing (MPB) Arrangement allows the customer to receive one bill from the billing company for the entire jointly provided service. The billing company will be billed by the other exchange telephone company(ies) for that portion of the access service provided by each exchange telephone company.

(A) General

The Telephone Company will participate in the Single Bill-Single Tariff MPB Arrangement, for access services other than MicroLink II(1), *if the exchange telephone companies involved agree to use the Single Bill-Single Tariff MPB Arrangement to render a bill to the customer and one of the other involved exchange telephone companies performs the billing company functions*. In addition, for Switched Access FGB, FGC, FGD, BSA-B, BSA-C or BSA-D, Switched Transport, Directory Assistance Services and Directory Transport, one of the other exchange telephone

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including NECA's access tariff⁵⁹ – still require **mutual agreement** through some form of voluntary contract between the joint-provider LECs. But now the ILECs in general and AT&T and Embarq in particular want to force a CLEC that provides PSTN connectivity to voice-enabled IP-based applications, devices and services to be the ILEC's "access customer" rather than a co-carrier and peer. They want the CLEC to pay the ILECs' perceived access charge entitlement. The ILECs presumably expect the CLEC to then recover the ILEC's share along with the CLEC's share from the ESP. That would be a complete and stark departure from industry practice, currently mandated by Commission precedent and rule, that any "single bill" approach for jointly provided access be done only when there is a separate contract between the LECs that is voluntarily and mutually negotiated.

FeatureGroup IP has an interconnection agreement with AT&T's Texas ILEC that specifically rules out use of the single bill option.⁶⁰ That agreement is a contract, and is in force.

companies must own or operate the end office. For Tandem-Switched Transport, one of the other telephone companies must own or operate the access tandem.

(B) Ordering

Each exchange telephone company involved in providing the service will accept an order for the access service from the customer.

For FGB, FGC, FGD, BSA-B, BSA-C and BSA-D Switched Access and Directory Assistance Services, **the exchange telephone companies involved in providing the access service will develop a mutually agreeable working arrangement to allow one of the exchange telephone companies to perform Access Service Coordination (ASC) for all services requested.** For DNAL, Special Access, MegaLink Custom Service and STN Service, the exchange telephone company that performs the billing function will serve as the ASC.

⁵⁹ See NECA FCC Tariff No. 5, § 2.47(B) Meet Point Billing, available at <http://www.neca.org/media/tariff5.pdf>:

Meet Point Billing is required when an access service is provided by multiple Telephone Companies for Feature Groups B, C, and D Switched Access Services, Directory Assistance and Special Access. It is optional for Feature Group A Switched Access Service.

...

There are two Meet Point Billing Options, Single Bill and Multiple Bill. These billing options are explained in (1) and (2) following. The Single Bill option is the preferred method. However, **when a single bill option can not be agreed to by all telephone companies providing service, the multiple bill option is the default.** (emphasis added)

⁶⁰ Attachment 12 – Compensation to the current ICA provides *inter alia* in §§ 6.4 and 6.5 (emphasis added):
6.4 As detailed in the MECAB document, the Parties will exchange all information necessary to accurately, reliably and promptly bill third parties for Switched Access Services jointly handled by the parties via the MPB arrangement. The Parties will exchange the information in Exchange

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AT&T cannot end-run the ICA terms by securing a waiver at the FCC or by making any changes to its tariffs. The ICA itself expressly denies them any such right or ability.⁶¹

FeatureGroup IP has most certainly not agreed to the single bill method. To the contrary, FeatureGroup IP's access tariff specifies that the multiple bill method will be used and does not even allow for the single bill method.⁶² If voice-enabled IP-based applications, devices and

Message Record (EMR) format, on magnetic tape or via a mutually acceptable electronic file transfer protocol. Where the EMR records cannot be transferred due to a failure of the Connect: Direct, records can be provided via magnetic tape, under the specifications contained in Attachment 4: Connectivity Billing and Recording. The initial billing company (IBC) will provide the information to the subsequent billing company within ten (10) working days of sending the IBC's bills.

6.5 Initially, billing to interexchange carriers for the Switched Access Services jointly provided by the parties via the MPB arrangement will be according to the multiple bill single tariff method. As described in the MECAB document each Party will render a bill in accordance with its tariff for its portion of the service. Each Party will bill its own network access service rates to the IXC. ...

⁶¹ See AT&T Texas/UTEX Communications Corporation Texas ICA, General Terms and Conditions §§ 30.2:

30.2 SWBT will not, of its own volition, file a tariff or make another similar filing which supersedes this Agreement in whole or in part. SWBT will make no filings which are inconsistent with this commitment. This Section is not intended to apply to any SWBT tariffs or filings which do not affect CLEC's rights or SWBT's obligations to CLEC under this Agreement. This Section does not impair SWBT's right to file tariffs nor does it impair SWBT's right to file tariffs proposing new products and services and changes in the prices, terms and conditions of existing products and services, including discontinuance or grandfathering of existing features or services, of any telecommunications services that SWBT provides or hereafter provides to CLEC under this Agreement pursuant to the provision of Attachment 1: Resale, nor does it impair CLEC's right to contest such tariffs before the appropriate Commission.

⁶² See FeatureGroup IP FCC Tariff No. 1 § 2.5.2(I):

2.5.2(I) Ordering, Rating and Billing of Access Services Where More Than One Exchange Carrier is Involved.

All Recurring and Non-Recurring Charges for Access Services provided by each Exchange Carrier are billed under each Company's applicable Tariffs. Under a Meet Point Billing arrangement, the Company will only bill for charges for Access traffic carried between the Company Meet Point and the calling or called party.

The multiple billing arrangement described in this section is subject to the provisions of the Multiple Exchange Carrier Access Billing Guidelines (MECAB) and the Multiple Exchange Carrier Ordering and Design Guidelines (MECOD). The Company will notify the Customer of: 1) the meet point option that will be used; 2) the Carrier(s) that will render the bill(s); 3) the Carrier(s) to whom payment should be remitted; and 4) the Carrier(s) that will provide the bill inquiry function. The Company shall provide such notification at the time orders are placed for Access Service. Additionally, the Company shall provide this notice thirty (30) days in advance of any changes in the arrangement.

The Company will handle the ordering, rating and billing of Access Services under this Tariff where more than one Exchange Carrier is involved in the provision of Access Services, as follows:

2.5.2(I)1. For FGD Access Service ordered to the Company's Local Switching Center through a switch operated by another Exchange Carrier with whom the Company has an

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services are subject to access, then the ILEC cartel must look to the ESP for payment and they must apply their tariffs to the ESP – and not to FeatureGroup IP. The ILECs cannot just impose their will on co-carriers through tariffs that on their face do not contemplate the result the incumbents seek, especially when that result would overrule 20 years of industry standards and practices that have been affirmatively prescribed by the Commission.

Thus, AT&T's "request for waiver of the ESP Exemption" under 47 C.F.R. § 1.3 – even if wrongly granted in violation of the Congressional codification of the ESP Exemption – would not allow it to impose access charges on interconnecting LECs like FeatureGroup IP because Congress also codified the concept of co-carriage and other Commission rules implement this statutory regime. If the traffic in issue (whatever it is, because the actual scope is horribly unclear) is indeed subjected to the exchange access regime, then it is jointly provided access and the Commission's rules and the statute require the ILECs to recover from the "VoIP" provider rather than the LEC that provides the PSTN connectivity to the "VoIP" provider. AT&T has not sought a waiver of or any change to the Commission's requirement that MECAB meet-point billing be used. The Commission cannot and should not change the industry practice. AT&T has not sought or obtained an amendment to the existing interconnection agreement with FeatureGroup IP. AT&T has not explained how the waiver in issue can operate to amend FeatureGroup IP's own tariff.

agreement, the Customer may be required to submit an order as specified by the Exchange Carrier which operates the switch.

2.5.2(I)2. Separate bills will be rendered by the Exchange Carrier for FGD access service.

2.5.2(I)3. Rating and Billing of Service: Each company will provide its portion of access service based on the regulations, rates and charges contained in its respective Access Service Tariff as appropriate:

2.5.2(I)4. The application of non-distance sensitive rate elements varies according to the rate structure and the location of the facilities involved. When rates and charges are listed on a per minute basis, the Company's rates and charges will apply to traffic originating from the Customer's Premises and terminating at the called party's premises, and to traffic originating from a calling party's premises and routed to the Customer's Premises.

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FeatureGroup IP strongly disagrees with the notion that ESPs of any ilk are subject to exchange access. But if the ILEC cartel finally does succeed in imposing a modem tax, they must collect that tax on their own and they cannot force FeatureGroup IP to be their tax collectors. We respectfully decline.

G. AT&T's and Embarq's switched access tariffs cannot be lawfully read to make Enhanced Service Providers involuntary "access customers"; nor can interconnected CLECs that are jointly providing access be required to pay AT&T or Embarq any access that is due.

1 The ILECs are completely vague, inconsistent and opaque on the exact traffic they are targeting for access charges. They simply cannot make up their mind about the scope of the requested relief, and each of the ILECs' requests is inconsistent with the others. They are indeed asking for a complete repeal of the ESP Exemption.

AT&T's recent request for Declaratory Ruling and/or Waiver talks about "VoIP." When AT&T actually gets around to trying to define exactly what it is addressing, however, it starts referring to "IP-PSTN traffic" and "PSTN-IP" traffic and further explains that it wants to capture "interconnected VoIP service" as well as "so-called one-way VoIP services." But then it goes on to say that it is in fact referring to "any IP-originated service that is delivered by a telecommunications carrier to a LEC for termination on the PSTN" and "any PSTN-originated service that is delivered by a telecommunications carrier to a LEC for termination on an IP network."⁶³ The latter description is not at all limited to "voice" traffic; indeed it would clearly include calls from basic users to dial-up ISPs notwithstanding AT&T's statement to the contrary later in the footnote. AT&T also says that the petition does not "extend to traffic terminated on the PSTN over local business lines (e.g., ISDN primary rate interface (PRI) lines" but then it almost immediately contradicts itself in the last part of the last sentence in the footnote: "provided that the LEC who ultimately terminates IP/PSTN traffic from the VoIP providers

⁶³ AT&T Declaratory Ruling/Waiver request p. 4, note 12.

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receives the appropriate inter-carrier compensation, as described herein." The petition to clarify inter-carrier compensation rules does not apply, so long as the ruling on the petition applies?

The whole thing is a complete mess. AT&T uses a bunch of nice-sounding words to make it appear this is all quite limited but their petition – properly construed – is clearly a request to repeal the ESP Exemption and/or to turn CLECs into access customers rather than co-carriers for all new technology traffic.

The rest of the ILECs' current requests for relief fare no better. Embarq's forbearance request is just as unclear about the scope of the traffic for which it seeks relief. Does it want to impose access charges on all "non-local"⁶⁴ (however that is defined) IP-based traffic that touches the PSTN regardless of whether it has a "voice" component? Or does the Petition extend "only" to "IP-to-PSTN voice calls?"⁶⁵ Embarq also refers to "IP-originated phone-to-phone" and even "phone to phone" (omitting reference to "IP-originated")⁶⁶ which could at least theoretically exclude IP-based communications that use software built into a PC rather than a separate handset. But then they also talk about "Interconnected VoIP service"⁶⁷ – presumably that covered by the FCC's definition of that term, which has specific criteria that must each be met, thus excluding many other IP-based voice-enabled applications, services and devices. If Embarq thinks these are all the same thing and that all kinds of IP-based voice-capable application, service and device are "purely substitutes for more traditional LEC services"⁶⁸ they are sadly

⁶⁴ The ILECs somehow convinced this Commission to rule that no ESP traffic can be local as a matter of law in the *ISP Remand Order*. They are still arguing that "that" ESP traffic should be "bill and keep."

⁶⁵ See, e.g. Embarq Petition pp. iii, 1, 5, 6, 8, 9, 13, 16, 17, 18, 20, 21, 23, 25, 26, 27, 29. As we have repeatedly explained in these and other comments, everything on the PSTN is a "voice" call regardless of whether it is really a FAX, TTY/TTD or two modems exchanging files. So clearly Embarq is – whether they admit it or not – wanting to impose access on everything IP.

⁶⁶ Embarq Petition pp. vi, 4.

⁶⁷ Embarq Petition pp. 1, 4, 5, 9, 10, 11, 13, 14, 21, 22, 24, 26, 28, 30.

⁶⁸ See, e.g., Embarq Petition p. 9. If Embarq is correct that "Interconnected VoIP services" like Vonage are "purely substitutes for more traditional LEC services" then Vonage is not subject to access as such, because "LEC

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mistaken. The Commission has held that "Interconnected VoIP service" is substitutable with some legacy services, but there is a huge and growing amount of IP-based traffic that is not associated with "interconnected VoIP service."

FeatureGroup IP also must observe – as we have several other times in these proceedings – that every call to or from the PSTN is a "voice" call. The PSTN is a "voice" network, and it was designed to work in the "voice" band. A standard call from a user with a modem connecting to a dial-up Internet access provider is making a "voice" call as far as the PSTN is concerned. The Commission should ask AT&T, Embarq and the rest of the ILECs whether their requests capture a call from an enhanced Facsimile Store and Forward service that launches a call to a user's stand-alone Group 3 FAX machine. What if the two machines are instead Class 3 FAX-capable modems? If the two modems also incorporate "Digital Simultaneous Voice and Data" capability per ITU V.70 and the users have a conversation while they are exchanging images, is that now a "voice" call? What about a voice mail platform that is configured to call a user on the PSTN and deliver a computerized notice that messages are waiting and offering to "play" them pursuant to a keypad command? Is that a voice call? Suppose a gateway receives emails or SMS messages and then calls a PSTN user and digitally "reads" the content to the user? Is that a "voice" call? Would the ESP Exemption no longer apply under the ILECs' requests? All of these would fall squarely within AT&T's description in its Docket 08-152 petition on page 4, note 12 and they do not say anything that would take these clearly enhanced features and services outside of their request.

services" are statutorily confined to "telephone exchange" and "exchange access" – neither of which incur access charges. IXCs provide "telephone toll" – which is not an "LEC service" although LECs often also act as IXCs – and "telephone toll" is what incurs "exchange access charges" under the Act and the rules. Again, Embarq's loose terminology prevents any reasonable assessment of what it is that it really wants.

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2. Applying exchange access to a sub-set of ESP traffic would violate §§ 201(b) and 202(a).

If the ILECs are trying to only remove some but not all enhanced/information service offerings from the ESP Exemption, then they are proposing to engage in unreasonable discrimination. It is axiomatic by now that the same costs are imposed on the network regardless of the regulatory classification of a particular call. An ILEC that terminates an "interconnected VoIP service" originated call incurs exactly the same cost as it does when a FAX comes to the same ILEC end user, or when the user's modem synchronizes with another modem, or when a gateway reads a translated email or SMS message. And each of these communications in one way or another is substitutable with or for a regular voice conversation between two ordinary handsets. There is absolutely no cost or other basis to create a ground of distinction that would allow one subset of ESP traffic to be assessed access charges but to continue allowing another to remain exempt. Any attempt to create subjective exceptions to the current rules would be unjust, unreasonable and discriminatory. The result would violate §§ 201(b) and 202(a).

3 Applying access charges to some or all ESP traffic would violate § 203(c) because ILECs current tariffs treat ESPs as end users rather than carriers.

The ILECs consistently say that "VoIP" traffic is subject to their switched access tariffs, but none of them have ever pointed to any specific tariff provision that so states. There is a reason: each of the ILECs' tariffs cannot in fact be read to apply switched access to ESP traffic. Any declaration or waiver that the traffic is subject to switched access charges would violate § 203(c) until tariff amendments that specifically bring the traffic into that regime are submitted and become effective. FeatureGroup IP will focus on AT&T Texas' tariff, but the result is the same for all the other ILECs.

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AT&T Texas' access tariff has express provisions that clearly operate to exclude enhanced service providers from coverage under § 6 unless they voluntarily subscribe. Two examples will suffice.

AT&T-Texas' FCC 73, § 3.3 (referring to "Carrier Common Line"⁶⁹) has this paragraph:

When access to the local exchange is required to provide a customer service (e.g., MTS-type, WATS-type, telex, Data, etc.) that uses a resold private line service, rates and regulations as set forth in Section 6 (Switched Access Service) and Carrier Common Line rates and regulations will apply except when such access to the local exchange is required for the provision of an enhanced service.

This provision – even though applicable only when a "resold private line" is used to access the local exchange – clearly and unambiguously implements the ESP Exemption.

And, of course, there is § 4, relating to "End User Access Service" which addresses a flat rate charge designed to recover non-traffic sensitive common line costs from end users, as contrasted with interexchange carriers. Since ESPs are treated as "end users" rather than carriers under the ESP Exemption and even AT&T Texas own access tariff⁷⁰ they are subject to the EUCL rate element⁷¹ and not the CCL rate element if they choose to obtain telephone exchange

⁶⁹ Carrier Common Line is a usage based rate element applied against interexchange carriers designed to recover non-traffic sensitive common line costs. While the rate has gone to zero for the most part, the rate element still exists and all the ILECs still have tariff provisions for it.

⁷⁰ AT&T Texas' FCC No. 73, § 2.7 (Definitions) defines an "end user" as any customer that is not a carrier":
End User. Denotes any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a Telephone Company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller. (Emphasis added)

⁷¹ The ILECs are fond of pointing to FCC decisions asserting that ESPs are users of "interstate access" to justify their position. But that proves nothing. Residential consumers of basic telephone exchange service are also "users of interstate access." Otherwise there could be no EUCL, which is an interstate access rate element chargeable to end users. The Commission has never held that any ESP must be a "switched access" user or an "exchange access user" although it has allowed ESPs to voluntarily subscribe. The Commission's ONA effort that "unbundled" switched access service with an eye toward luring ESPs to voluntarily buy was a failure. ESPs almost without exception choose to stay "end users." Another example demonstrating non-applicability is that when an ESP procures a special access facility that can access exchange facilities the Special Access Surcharge applies rather than switched access (or CCL) charges. See AT&T Texas FCC No. 73 § 7.2.5. This flat "leaky PBX surcharge" is assessed on users to recover some of the same costs as usage sensitive switched access.

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service from AT&T Texas. They are not subject to § 3 and most certainly not subject to § 6. While it is true that the switched access portion of the tariff does not have an express statement that ESPs (or even those that provide "voice" service) are not mandatorily subject to it we never even get to that point because the definitions in § 2, the provisions in § 3 and the wording in § 4 mean that switched access under § 6 simply does not apply.

AT&T and Embarq and the rest of the ILEC cartel may want ESP traffic to be subject to the switched/exchange access regime (in other words they want to eliminate the ESP Exemption), but that is not what their tariffs currently say. Any attempt to subject ESP traffic to switched access rates would violate § 203(c). Section 203(c) prohibits charges different from, or in excess of, that allowed by a tariff and any attempt to classify a person in any way other than as allowed by tariff. Since the ILECs' switched access rates do not apply the applicable rate is effectively "zero." Any attempt to recover exchange access charges from an ESP in any amount other than "zero" would violate § 203(c). Further, since the ILECs' tariffs do not classify ESPs as persons subject to switched access any attempt to make ESPs pay switched access rates would violate § 203(c). No "declaration" or "waiver" can just magically change the plain words and meaning of the ILECs' access tariffs.

4. This is not just a "rating" question. Elimination of the ESP Exemption will lead to massive and horrendously expensive network reconfigurations and major changes in routing and signaling.

FeatureGroup IP demonstrated in its comments on Embarq's forbearance request and NECA's signaling request that this is not just about "rating" or "signaling." Doing what the ILECs want would require a major conversion of "end user" ESP network connectivity methods to switched access Feature Group D connections and a need to obtain expensive SS7 signaling links rather than PRI D channel signaling links. The ILECs have yet to respond to that showing.

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AT&T's recent petition relegated the topic to a cryptic footnote. They claim ESPs could still use ISDN PRIs and nothing would have to change other than the price.⁷² This is simply not true. Feature Group D is not an ISDN PRI. The technical descriptions cannot be reconciled. The physical interconnection method is different. The interface, features, functions, capabilities and signaling protocols are different. ISDN PRI is "network to user" whereas Feature Group D is "network to network."

If the ILECs want to pretend that the arrangement is "really" Feature Group A then they need to talk to their engineers. Feature Group A is a "line side" connection. It does not provide CPN, answer supervision or any of the other traditional "trunk side" functions. ISDN PRI, however, does provide for these signaling elements, but in different ways than Feature Group D and Feature Group B. ESPs have been sending the CPN the ILECs have been demanding over the D channel using Q.931. The LEC end office then places the Q.931 CPN information element data into the SS7 ISUP IAM CPN parameter. ISDN PRI is not Feature Group A, B or D.

AT&T is also failing to disclose how this will all be carried out from a routing, recording and billing perspective. There are only two possible ways. One way would be to require all ESP traffic to be routed over "meet point" Feature Group D trunks that go to "access tandems" rather than what the ILECs call "local interconnection trunks." The ESPs would have to order access under § 5 after they have requested and been assigned CICs. Otherwise the ILECs have no way to set up their systems to begin directly identifying, tracking and billing the ESP for the "access charges" they claim they are entitled to receive. The only other way is to "allow" CLECs to continue to serve ESPs using ISDN PRI arrangements that route over so-called "local interconnection trunks. But if this is the method to be used then the CLEC will have to identify

⁷² AT&T Petition for Declaratory Ruling and Waiver, p. 4, note 12.

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the traffic that is now subject to "access" and then report it to the ILECs in some manner so the ILEC could then bill either the CLEC or the ESP. AT&T Texas' "expert" witnesses affirmatively testified that this was so in a recent case in Texas. In that case AT&T Texas asserted that FeatureGroup IP had to be responsible for "access charges" related to its ESP customers' traffic because AT&T Texas could not directly bill the ESP "access customers" since the traffic had no CIC and was not routed through an access tandem and AT&T Texas was not receiving "appropriate" "Access Usage Records":

Q. DOES UTEX HAVE A MECHANISM TO PROTECT ITSELF FROM UPSTREAM CARRIERS⁷³ THAT DELIVER THESE INTERLATA CALLS TO UTEX?

A. Yes. As noted above, UTEX can provide Access Usage Records ("AURs") to AT&T Texas that will allow AT&T Texas to bill the upstream company. The AURs should be populated with the Carrier Identification Code ("CIC") or Operating Company Number ("OCN") of the company that is to be billed for this traffic.⁷⁴

Another AT&T witness in the same case confirmed and expanded on how AT&T's plan will have to be executed in real life during oral testimony:

14 Q On your rebuttal, Page 26, Lines 6 to 8,
15 Page 28, Line 6, you basically say with regard to this
16 interLATA traffic that you've identified or claim to
17 be interLATA, that if -- if UTEX will just give AT&T
18 some access usage records so that you can bill
19 somebody else, then you won't default bill us the
20 interLATA. Is that a fair characterization?
21 A (Pellerin) Yeah. If we were billing
22 somebody else, we wouldn't be billing you.
23 Q Where does it say in the interconnect
24 agreement that you can hold us jointly and severally

⁷³ AT&T Texas' position in the case was that UTEX's customers were not "really" ESPs but were instead "carriers." This is so even though one of those customers has been repeatedly held to be an ESP and not a carrier by a federal bankruptcy judge in the Northern District of Texas. That same customer was one of the initial named respondents in Southwestern Bell Telephone Company's Petition for Declaratory Ruling in WC Docket 05-276.

⁷⁴ Texas PUC Docket 33323, *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution With AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution With UTEX Communications Corporation*, AT&T Texas Exh. 17, Prefiled Direct Testimony of William A. Cole, p. 30, lines 14-20.

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25 liable for some other carriers' originated traffic?

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1 A (Pellerin) It says that when you deliver us
2 traffic over those local interconnection trunks,
3 there's certain provisions in Attachment 12 that
4 apply. There's provisions for local traffic, there's
5 provisions for interLATA traffic, there's provisions
6 for intraLATA traffic.

7 Q But we're not the originating carrier under
8 your theory, are we?

9 A (Pellerin) That's not relevant.

10 Q Oh, I see. But if we pass you in AUR that
11 shows there is another originating carrier and you can
12 go bill somebody else, then you won't default bill us?

13 A (Pellerin) For those calls.

14 Q For those calls. This is what interests me.
15 On your rebuttal Page 8, Lines 1 through 7, you say
16 that in order to be able to pass AURs to AT&T, we
17 would have to subscribe to the recording appendix in
18 Attachment 24 and pay you to get the AUR that we then
19 give back to you. Is that what you're saying?

20 A (Pellerin) In the context of what UTEX has
21 presented as jointly provided access, there's an
22 exchange of records between the parties such that each
23 can bill their respective components to the
24 interexchange carrier. Absent those records we don't
25 have the ability because these are not Feature Group

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1 D-type trunks where they have those recordings.

2 Q Well, I'm focusing on your testimony now on
3 Page 8, Lines 1 through 7, and I'm putting it together
4 with your testimony in your rebuttal on Page 26, Lines
5 6 through 8, and 28, Line 6. And let me see if I've
6 got it right here. You say if we send you an AUR that
7 allows you to bill somebody else you won't bill us
8 interLATA access. And then if we look at rebuttal
9 Page 8, you say that in order to be able to get AUR
10 records to give you, we have to subscribe to Recording
11 Appendix Attachment 24 and get the AUR records from
12 you and then turn around and give them back to you.
13 Is that your testimony?

14 A (Pellerin) I would have to look closer at
15 that recording appendix, and I don't profess to be a
16 billing and recording expert.

17 Q Well, that --

18 A (Pellerin) It was my understanding that

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19 there would need to be an exchange of these types of
20 records. There's a provision in this appendix for
21 those records to actually be made, which we don't
22 ordinarily make on this type of traffic coming over
23 POTS interconnection trunks. So we would have to do
24 something different than we normally would in order to
25 get those records.

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1 Q Okay. So your testimony is we have to pay
2 you in order to not pay you. Isn't that true?

3 A (Pellerin) I suppose that would be one way
4 of characterizing it.

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...

4 REDIRECT EXAMINATION

5 BY MS. KEENEY:

6 Q Ms. Pellerin, I believe that you testified --
7 okay, whoops. Get all my stuff out of the way. You
8 testified on direct about an obligation on the part of
9 UTEX to purchase AUR's from AT&T, did you not?

10 A (Pellerin) Actually, it was in rebuttal.

11 Q It was in your rebuttal?

12 A (Pellerin) Right.

13 Q No, but -- I'm sorry, on cross-examination
14 you testified about that.

15 A (Pellerin) Yes.

16 Q Regarding your testimony in your rebuttal.
17 Is that testimony entirely accurate?

18 A (Pellerin) No, it's not.

19 Q All right. Would you like to correct that?

20 A (Pellerin) I would be delighted to clarify
21 things. Mr. McCollough took me to page 8 of my
22 rebuttal, and on the break I looked back to the
23 beginning of that paragraph which starts at line 22 on
24 page 7 to get the proper context for it. And what I
25 state here is that UTEX is claiming that where access

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1 charges do apply, that is jointly provided access.
2 And so that was the context of my thinking in terms of
3 the access usage records, that jointly provided access
4 is a meet point billing arrangement. In a meet point
5 billing arrangement the parties have to capture and
6 exchange the access usage records so that each party
7 can bill their element of the call to the
8 interexchange carrier. And that's what's referenced
9 in Attachment 24, recording facility based, where

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10 there is a charge for those access usage records.
11 In the situation that we've got where
12 we're not talking about jointly provided access, the
13 usage -- UTEX does not need to pay us for records so
14 that they -- so that we can bill somebody else and not
15 them. So that was an incorrect expression on my part,
16 because I didn't have the full context of it. But in
17 order for us to bill somebody else, they would have to
18 give us records in order for us to do that, because we
19 don't know who to bill.
20 Now, if we were to go into a meet point
21 billing arrangement, then some of the other terms and
22 conditions of the contract would apply. But in my
23 mind that doesn't really make a whole lot of sense
24 because the purpose of meet point billing is for one
25 carrier's end users to be able to access an

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1 interexchange carrier where their local service
2 provider doesn't have a direct interconnection with
3 those IXC's.
4 AT&T has interconnection with all of the
5 IXC's. So there isn't any reason for an IXC to go to
6 somebody else to deliver us traffic for our end users
7 unless -- unless their least cost routers are looking
8 to avoid AT&T's terminating access charges.⁷⁵

AT&T left no doubt in the Texas complaint case that it would unilaterally "default bill" CLECs for jointly provided access – notwithstanding any interconnection agreement terms, the FCC's MECAB rule, note 92 in the *AT&T Declaratory Ruling* and even AT&T Texas' own access tariff provisions relating to the "Single Bill Option" – unless the CLEC gathered specific call detail and then delivered it to AT&T Texas in the form of an "Access Usage Record" ("AUR"). They were frank in their position that this is "access traffic" and must be treated as such, by routing through access tandems, by everyone getting the "proper" CIC and by everyone sending the "appropriate" records. But they were also very clear: if they are not successful in

⁷⁵ Texas PUC Docket 33323, *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution With AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution With UTEX Communications Corporation*, Hearing on the Merits Transcript, Nov. 7, 2007.

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getting ESPs treated like IXC's in all ways then they will just default bill the CLEC. And they do not care whether any statute, rule, tariff or contract says otherwise. This Commission must make them stop violating the law and it must order them to quit taking this unilateral action.⁷⁶

The ILECs are intent on getting the Commission to turn CLECs into the ILECs' access charge tax collectors and remitters. But it is not that simple. The CLEC will not know if any ESP call is "voice" or "not voice" any more than would the ILEC. To both LECs it is all "voice" even if it is in fact a FAX or a "reading email." The only way for the CLEC to implement its new duties would be to require the ESP to segregate its traffic over different facilities – with one group of lines for "exempt" and another for "not exempt" – so the "not exempt" traffic can be identified, measured, recorded and reported to the ILEC. There is no other practical way to carry it all off. And there will absolutely still be disagreements over whether the CLEC did it right and the ESP was following the "rules." The ILECs will not accept, for example, a certification from the ESP and the CLEC.⁷⁷

But none of this is dealt with in any current tariff or interconnection agreement. So the terms will have to be developed, negotiated, submitted and approved. There will be disputes. It will be litigated, although it is not entirely clear what venue – the state commissions, the Commission or somewhere else – will be the one to sort it all out. And it will go to the Supreme Court at least two times, maybe more.

⁷⁶ See FCC November 24, 2004 Press Release "Chairman Powell Issues Statement on SBC's TIPTOP Service" available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254681A1.pdf ["Should we conclude that this tariff is being used to justify the imposition of traditional tariffed access charges on VoIP providers or to discriminate against SBC's competitors, the Commission will take appropriate action including, but not limited to, initiating an investigation of SBC's interstate tariff and any other tariff that proposes similar terms. Nothing in this tariff should be interpreted to force a set of compensation relationships on VoIP providers and their connecting carriers either at this Commission or in other venues."]

⁷⁷ WC Docket 05-283, *Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-Certification of IP-Originated VoIP Traffic* (filed Oct. 3, 2005).

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A "declaration" or "waiver" will not solve the perceived problem. The policy wonks and paid-for economists may think the job can be done by a simple waving of hands that magically converts a huge amount of currently exempt traffic into non-exempt traffic that can then be immediately identified and billed "to the responsible party" so checks will be cut by the "responsible party" and cashed by the ILECs. The reality is much different and that is simply not what will happen. The litigation, planning, implementation and ultimate accomplishment of the massive trunking reconfiguration, network routing, signaling and billing system changes will be completed on about the same time frame as "unified intercarrier compensation." This is not by any means something that can be done on an "interim" basis. The twelve years of experience we now have dealing with implementation of the Act should inform anyone who thinks differently.

The Commission must quit trying to put a finger in each of the holes that are simultaneously and sequentially appearing in the dike. You do not have enough fingers, and the holes are far too many and large. Just blow up the dike and finally adopt the scheme Congress envisioned when it passed the 1996 amendments. The flood of new, innovative and beneficial applications and services will finally really begin in earnest.

H. The important issues are not just about "termination" and concern more than just "rating." The Commission must comprehensively solve signaling, routing and rating for originating and terminating traffic exchanged between LECs.

The ILECs insist that This Is An Emergency And It Must Be Solved Right Now. Today's "Emergency" is the price they are entitled to be paid for terminating "voice" traffic they receive from CLECs. It is All About Them Terminating VoIP. They do not want to receive the statutorily-required § 252(d)(2) "additional cost" payment through § 251(b)(5) reciprocal compensation for "this" ESP traffic. The "Interim Final Solution" is an interlocutory ruling that mandates access payments to the ILECs when two LECs jointly cooperate to provide telephone

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exchange traffic and also requires the entire world to do whatever it takes to ensure ILECs get signaling information they probably cannot really even use "to identify the responsible party."

But we have not yet solved the last ILEC Emergency. It was not that long ago that it was All About Them Originating ISP-bound calls destined for CLEC networks. They did not want to pay access for this ESP traffic. They did not want to pay reciprocal compensation for this ESP traffic. They did not want to pay anything at all so "that" ESP traffic had to be bill and keep. The Commission decided to do what the ILECs wanted. We are now one vacatur, two remands and one mandamus down the road – with no final resolution and a huge possibility that the last 7 years of inter-carrier compensation will have to be completely unscrambled.

Undeterred, the ILECs want to do it again, but "this" ESP traffic cannot be bill and keep. It has to be exchange access payable to them, regardless of direction. One can fairly easily anticipate how the D.C. Circuit will respond to an order saying that ILEC-originated "ISP-bound traffic" ("that ESP traffic") is bill and keep or subject to a \$0.0007 paid to the CLEC but ESP "VoIP" traffic ("this ESP traffic") is exchange access that is payable to the ILEC and chargeable to the CLEC and the ESP regardless of direction. There is no theory of law that can hold both of those propositions at the same time. The only coherent approach is to subject it all to § 251(b)(5) and § 252(d)(2) just like Congress decreed.

The urgent necessity is to resolve on a complete, holistic basis all of the issues related to the signaling, routing and rating of traffic exchanged between LECs. It is not just rating for terminating and it is not just rating for originating. It is both.

But wait there is more. We also must have some decisions on signaling. And routing. The ILECs want rulings on signaling, and while FeatureGroup IP disagrees with NECA for all the reasons set out in our February 19, 2008 Opposition to NECA's Petition for Interim Order on

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signaling in WC Docket 01-92 we do agree that the Commission should provide guidance on the topic. We sincerely hope the Commission will continue applying the principle that dominant bottleneck providers – whether a cable company or an ILEC – cannot be allowed to “break” or “overrule” basic Internet standards and practices in ways that erect barriers to entry and deter the offering of new services and technologies based on Internet – rather than legacy telephone – protocols and standards.⁷⁸ NECA’s signaling demands ultimately ask the Commission to overrule Internet standards and protocols. Interestingly, they also ask the Commission to overrule legacy signaling protocols relating to the structure and syntax of the information populated in the SS7 ISUP IAM CPN parameter.

But wait, for that is still not all. There’s even more. The Commission has two long-standing requests for relief in WC Dockets 01-92 and 04-6. Since they were not initiated by ILECs and in fact complained of ILEC actions they have not been deemed sufficiently important to resolve.⁷⁹ In 2002 Sprint filed a *Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs* in CC Docket No. 01-92. ASAP filed its *Petition for Preemption of Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Providers*

⁷⁸ See Comcast Order, *supra* at ¶ 20 (notes omitted):

Historically, “the innovation and explosive growth of the Internet [has been] directly linked to its particular architectural design.” Thus, “variances from those standard protocols and practices damages the Internet as a whole,” including the ability of entrepreneurs to enter the market with new Internet services. Contravention of these standard protocols and practices through discriminatory conduct thus erects barriers to entry that would not otherwise exist. Entrepreneurs are no longer able to design new services and technologies around known protocols and standards, but must spend considerable time and resources in an effort to accommodate Comcast’s particular network management practices— a task made all the more difficult by the company’s obfuscation regarding its actual practices. By exercising authority over this complaint, we are able to ensure that Comcast’s actions do not inappropriately hinder entry by “entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.” In addition, by facilitating such entry, we also promote the Act’s policies favoring “a diversity of media voices” and “technological advancement.”

⁷⁹ The ILECs apparently get to automatically move to the front of the queue at the Portals, and all the rest of the rabble are consigned to wait for their complaints to be addressed until after the ILECs’ Very Important List is disposed. Sadly, that List never seems to end.

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in WC Docket 04-6 in January, 2004. Both related to ILECs' refusal to recognize and honor CLECs' and CMRS carriers' assigned numbering resources. They will not do the switch translations necessary to route calls originating on the ILEC's networks that are addressed to competitors' networks – unless, of course, the ILEC recovers switched access for their own originated traffic.⁸⁰ The problem has not gone away, and it has directly impacted FeatureGroup IP's ability to provide a tariffed interstate service. Fairness requires that the Commission at least issue rulings on those long-standing requests for relief.

FeatureGroup IP has been working directly with industry leaders like Skype and Google and has developed and improved interoperation capability between the old and new networks. FeatureGroup IP applied for and was assigned a non-geographic block of numbers that the PSTN can route to. In its application for numbers to NANPA, FeatureGroup IP fully explained the anticipated use as part of a telephone exchange service (*i.e.*, not a "telephone toll service") that would be offered to ESPs using these numbers. In July of 2007 FeatureGroup IP tariffed the service offering.

The ILECs, led by AT&T, refuse to honor these numbering assignments and will not route calls originating on their network addressed to these numbers – unless FeatureGroup IP pays each of the ILECs significant and ruinous nonrecurring and recurring access charges. This is so even though this is a service for ESPs and is a telephone exchange product rather than a telephone toll service product. The ILECs appear to believe that "nongeographic" numbers are inherently "interexchange" services used by IXCs and that ILEC routing to 500 numbers is covered exclusively by their access tariffs rather than interconnection agreements or some other agreement. While this neatly fits in their "access to us for everything; bill and keep for you"

⁸⁰ But see 47 C.F.R. § 51.703(b): "(b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."

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theory it is decidedly incorrect. When the Common Carrier Bureau granted a waiver and allowed SWBT's "500" tariff to go into effect, it specifically reserved the issue of "whether enhanced service providers or cellular companies should pay interstate access charges in conjunction with 500 access service."⁸¹ FeatureGroup IP's nongeographic number based service is not subject to access charges. But the ILECs just will not obey the rules. Instead they make up their own rules and then enforce them by refusing to route their originating traffic to co-carriers unless the co-carrier waives its rights and "volunteers" to be treated like an IXC.

The ILECs apparently believe that CLECs are not really LEC peers and the ILECs do not have any obligation to do switch translations or route calls unless the CLEC becomes an ILEC "access customer" by "volunteering" to be treated like an IXC rather than an LEC. The ILECs assert that CLECs owe access when they send calls to the ILEC for termination, and the CLEC also owes access when the ILEC originates calls addressed to the CLEC's network. The ILEC never pays the CLEC anything, but the CLEC always pays access to the ILEC.

I. USF position summary.

The Incumbent Cartel continually and strenuously lays out a parade of incredible horrors that will surely obtain if the Commission does what it was instructed to do in the 1996 amendments. It is high time that we call the existing universal service scheme what it is: a failed special interest grab that falls woefully short of fulfilling its stated and unstated policy goals and lets lazy incumbents unfairly line their pockets while abusing their monopoly positions – often through less than truthful but quite effective lobby efforts.

⁸¹ Order, *In the Matter of The Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., Cincinnati Bell Telephone Company, GTE Services Corporation, The NYNEX Telephone Companies, Pacific Bell, Rochester Telephone Corp., Southern New England Telephone Company, Southwestern Bell Telephone Company, The United Telephone and Central Telephone Companies, and U S West Communications Petitions for Waiver of Sections 69.4(b) and 69.106 of Part 69 of the Commission's Rules*, DA-94-1350, ¶ 32, 9 FCC Rcd 7873 (rel. Nov, 1994).

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The current implementation is the antithesis of "technologically neutral." It naturally favors the rent seeking cycle of failed regulation and actively discourages facility based competition by new entrants. These are not just bald accusations; they are truisms that are well understood by many policy makers, incumbents and anyone who actually spends time studying the current USF regime. For example, below are the observations submitted in some recent USF comments by three Texas law students that have formed a non-profit Local Exchange Company in Texas in an to attempt to make a difference in this area:

In Fact, Current USF Policy is a Trick

Universal Service is a venerable part of our communications policy and its stated goals are both necessary and honorable. However, a pattern of neglect in recent years has transformed the USF program into a national boondoggle. Limiting universal service support to obsolete voice mechanisms creates a *subsidized inefficiency*: one hand of the government enforces the monopoly of legacy voice service by preventing interconnection with efficient services like Skype, and the other hand pays billions of dollars a year to subsidize obsolete legacy "voice service" *at a cost level inflated by the same policies* blocking market entry by competing services. The result is that both "hands" form a chokehold against progress to efficient attainment of universal connectivity and communications through new technology and business models.

This perverse twist of political logic is akin to supporting "universal travel" by taxing gasoline to fund transport by stagecoach. We should not protect obsolete legacy services and service providers against disruption by new technologies and business models; we should fund universal communications capability by supporting access and applications that are provided through the most efficient and productive means. Subsidizing yesterday's technologies and business models is unsustainable policy. The current and proposed USF approaches we have seen will ensure that the neediest receive only second-class, overpriced communications tools. We can do better.

The Solutions Are Obvious

The Commission's previous paeans to "technological neutrality" sorely underestimated the litany of excuses since proffered as "legitimate economic or technical differences" justifying regulatory largesse. Incumbent providers' thinly-disguised defenses of their stagnant markets are now long past their sell-by dates.

The current USF proposals present a stark choice. We can retain an increasingly strained taxonomy of communications technologies: "voice," "advanced services," "mobile," "broadband," and so forth. Or, we can choose to recognize the reality that has existed for several years: "voice" is merely another form of data, whether transmitted through the air or a wire, whether sent through

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an old Stromberg-Carlson step-by-step switch or via Skype; artificial distinctions that permit legacy carriers to charge consumers for data sent by *objectively less efficient means* are preventing desperately-needed reforms of our communications industry.

Universal service should not be a part of this shell game; the Commission must guard this fundamental ideal against abuse by politically connected incumbents. Universal service has been a touchstone of our public policy for nearly a century, and ubiquitous communications are bedrock of our competitive infrastructure. The Internet era has resoundingly validated the notion that communication networks become vastly more valuable when available to everyone—especially that last slice of consumers targeted by universal service support.

But those consumers—mostly rural and low-income Americans—lack the political might of incumbent telcos. Consequently, those areas that would benefit the most from new technologies have been neglected.

Rather than concocting creative new ways to shoehorn novel technologies like mobile and broadband into an increasingly fragmented regulatory regime, the Commission should stay true to the policy of technological neutrality it proposed years ago.

It is crucially important that the Commission and the Joint Board end the protection racket built by incumbent providers on transparently false claims of technological backwardness, and instead demand a return to the simple, plain policies laid out in the 2005 Intercarrier Compensation *Further Notice*. Specifically, the Commission should:

- (1) Reject the Joint Board's arbitrary disaggregation of mobile, broadband, and voice support, and instead adopt a forward-looking Universal Service policy that explicitly recognizes the public, interconnected nature of all networks, "voice," "data," or otherwise.
- (2) Immediately cease subsidizing voice services whose costs are already inflated by the Commission's own carrier-protection regimes.
- (3) Explicitly concur with AT&T's critique of Time Warner and Sprint's argument that internet service is ineligible for universal service support by affirming that the Commission's authority under its mandate is intended to be forward-looking and to encourage technologies that support American competitiveness, not limited to propping up whatever infrastructure happened to be built in previous decades.⁸²
- (4) Reject Vonage's proposal for an antiquated number-based access system as the clumsy attempt at regulatory capture that it represents.
- (5) Unequivocally reject AT&T's blatant plea for incumbent monopoly protection via a year-long pre-qualifying period for USF providers.
- (6) Adopt AT&T's suggestion that universal service support be allocated on a more granular, affordability-based metric, but move beyond AT&T's focus on rural support to clearly include the long-standing but

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oft-neglected goal of low-income support, and further demand that AT&T participate in its own proposed regime by making its wire center and line costs transparent to the public that funds them.

(7) Allocate the Universal Service Fund on a competitive, technology-neutral, functional basis, focusing on real-world uses rather than on particular technologies or outdated definitions of "services." *The Commission's primary concern must be with costs and applications, not the mechanisms by which services are delivered.*

More generally, the Commission ought to refocus its regulatory energies on five simple precepts:

(1) Universal service, at its heart, simply means affordable access to communications capability for all Americans, by whatever means necessary. Our first concern should always be making certain that all citizens – especially those of lesser means or in remote parts of the country – have access to the same capabilities as everyone else.

(2) Technology is the ally of an enlightened communications policy. We should invest in infrastructure and user control, not "services" as defined by outdated technologies and business models. Moore's law applies to communications services: costs should perpetually decrease while performance increases. We should never pay to retain a legacy technology when more efficient options are available.

(3) Companies that receive public support via the Universal Service Fund bear a reciprocal obligation to the public to provide accurate, transparent accounting of the costs they incur and to compete vigorously in providing superior service.

(4) Communication networks should be approached not as different technologies which must all be accommodated mindlessly, but as different sectors of the same public network—generally, the Internet—which ought to be interconnected on a protocol- and application-neutral basis.

(5) Communications policy should be elegant and predictable, not arcane or apocryphal. Competition flourishes best in an environment of regulatory clarity.

Financial interests notwithstanding, providing effective communications to all Americans is a necessary and vital goal in and of itself. Our conscious failure to live up to that ideal is both economically and morally unacceptable. We have nickel-and-dimed our way past hard questions that accompany the new reality of global communications and as a result we are risking our leadership in the sector, if we have not lost it already. The rest of the world is not waiting for us to untangle our outmoded rules and old habits. There are no more second-best options.

The Commission must reclaim its statutory and public obligations to defend the competitive integrity of the communications industry. Despite a broad consensus that we must move forward, regulatory inertia and a general lack of political will have us chasing an ever-receding technological curve. Solutions to

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these issues may be unspoken, but they are not unknown, and in the future we will not be able to claim that we did not understand the questions before us. We will be remembered by whether we chose to answer them.⁸³

Will the Commission will do the work it is supposed to do in this area and follow the coherent lead of these students?⁸⁴ The solution must be no longer a series of "tricks" played on the public about the price it pays. There can be no more ties between the implementation of USF policy and the arbitrary non-cost based rates the ILEC cartel has been allowed to charge its users and its competitors. To this end and in line with the USFon ideas we propose the following simple and elegant solutions:

- Universal Service subsidies should disaggregate applications from the network. Pressure will be removed from the Universal Service Fund by not having to support outdated, overpriced and comparatively ineffective legacy ILEC switching infrastructure.
- USF should support connectivity and network, not Legacy services. Actual costs and actual investment rather than make-believe economic models used by Incumbents that have billions of dollars of revenue per quarter.
- USF should immediately base entitlements on the actual earnings of the cartel Incumbents and their corporate families. These companies have been recovering and over-recovering on their investment and now have a dominant and anti-competitive hold on many markets. These advantages and the fact that many of the cartel have earnings and profit margins that grossly exceed any kind of reasonableness can not any longer be ignored. If the Commission can cap new entrants it can also prevent over-earning by monopoly positioned incumbents.
- USF should be available to all networks. If funding goes to "services" rather than "connectivity" many other services are as – or even more – deserving. The Internet has many.
- Interconnection Policy should support historical public policy goals while subsidies move from application to network support by requiring equal peering/interconnection rights to mobile and IP based services that do not favor ILEC standards or technologies.
 - Internet-based communications, if allowed to evolve and serve users without subjugation to legacy access charge rules, could dramatically ease the burden on

⁸³ Comments and Proposals of USFon, Inc., *In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 and WC Docket 05-337 (April 17, 2008).

⁸⁴ Or, are these students simply being naïve in thinking that universal service is in fact supposed to be what it is represented to be rather than a slush-fund used by politicians to benefit favored supplicants and present or future campaign funds?

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- the Universal Service Fund. "VoIP" could be a free alternative for traditional voice telephony if we allow it.
- Current incumbent ILEC distribution of voice is economically 10 to 15 times more expensive to provide when compared to IP and Mobile "voice." Thus IP-based services and applications and Mobile voice must be supported or even preferred because they cost less to provide and offer more functionality and utility. The current emphasis on Legacy wireline service needs to end.
 - IP and Mobile voice have more benefits to those USF is supposed to help;
 - Allowing alternative providers of USF allows investment in new technology and, would drive more intelligent, efficient and pro-competitive interconnection policy.
- The FCC should immediately prohibit distribution of any USF support to any entity or affiliated entity that does not also explicitly support "Open Network Goals." If an LEC or one of its affiliate blocks or reduces the effectiveness of any Internet application, they should be barred from the USF program.

CONCLUSION

Inter-carrier compensation – all of it – must reflect only the "additional cost" of terminating a call. All subsidies must be moved over to universal service support, which has to be explicit, nondiscriminatory and competitively neutral. Anything less will make the FCC complicit in unfairly favoring owners of incumbent networks over developers of new technologies and innovators. The rule of law must be applied or it is not a rule at all.

Enhanced/information service providers are not carriers and do not provide telephone toll, so they cannot be held subject to exchange access charges. When two LECs exchange traffic and when the originating LEC is not functioning as a provider of telephone toll then §§ 251(b)(5) and 251(d)(2) directly apply. If and to the extent traffic exchanged between two LECs is subject to exchange access then they are joint providers and one LEC cannot charge the other because they each look to the entity providing telephone toll service for payment. The ILECs cannot force CLECs to implement the MECAB "Single Bill Option." Long-standing Commission rules, industry practice and even the ILECs own tariffs require mutual voluntary agreement in a

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contract before the Single Bill Option can be used. The same rules apply to CMRS to the extent it is providing "telephone exchange" and/or "exchange access" service.

There are fundamental questions regarding how multiple LECs signal, route and rate the traffic they jointly handle as co-carriers and peers. Most of these rules already exist, and many of the issues were already resolved even before the 1996 amendments. But the ILECs never quit trying to retroactively change rules they do not like. The Commission must rebuff the latest efforts and this time it must enforce the existing rules.

The ILECs' unrelenting campaign to eliminate the ESP Exemption and turn co-carriers and peers into "access customers" must be rejected. Now. The Commission must finish its statutory task of unifying intercarrier compensation on a holistic basis, without "interim" steps, declaratory rulings or waivers. If it does so the all of the cases in the caption of this pleading can come to a close. If it does not do so, then it must grant FeatureGroup IP's petition in WC Docket 07-256.

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Respectfully Submitted,

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August 21, 2008